

In the
Supreme Court of the United States

MILES CHRISTIAN-HART,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

On Petition for a Writ of Certiorari to the
District Court of Appeal, Second District, State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On April 7, 2015, in a frenzied Florida rocket docket at which 50-60 contested and uncontested cases presented for trial, a judgment of foreclosure was entered against Petitioner Hart in favor of Respondent Wells Fargo for a loan which never closed, for which the note and mortgage Hart had signed in anticipation the loan would close were recorded in error, for which none of the payees listed on the proposed HUD-1 were paid and for which Wells Fargo perpetrated a fraud on the court to deceive the court into concluding the loan had been funded. In this trial, Wells Fargo had offered up deceptive releases to show the loan was funded, never disclosed on Wells Fargo's exhibit list. One was a release Wells Fargo knew had been rescinded as issued in error. Another was a release Wells Fargo knew was unrelated to this purported loan. On Wells Fargo's exhibit list, it had disclosed the note and mortgage as documents it intended to introduce at trial as Florida law requires that a judgment of foreclosure be supported at trial by competent, substantial evidence, and that said note and mortgage must be introduced and admitted at trial. In this case, neither were introduced much less admitted at trial and the only note and mortgage in the trial record is for a loan between a Phyllis Savage and Bank of America. Hart filed a motion for a new trial and his new attorney filed an amended motion for new trial and a motion for leave to file omitted counterclaim. After the successor judge initially agreed to hold a hearing on Hart's pro se motion, the court denied all motions and abruptly cancelled the hearing denying Hart an opportunity to be heard. The question presented is whether due process can abide a

system in which, as will be seen, one level of due process is accorded the bank and another level of due process is accorded the borrower.

PARTIES TO THE PROCEEDING

Petitioner

- Miles Christian-Hart, was the defendant in the trial court in the Circuit Court of the Twelfth Judicial Circuit, in and for Sarasota County, Florida, and the appellant before the District Court of Appeal, Second District, State of Florida.

Respondent

- Wells Fargo Bank, N.A., was the plaintiff in the trial court and the appellee before the District Court of Appeal, Second District, State of Florida.

LIST OF PROCEEDINGS

Circuit Court of the Twelfth Judicial Circuit In and For Sarasota County, Florida

Case Number: 2010 CA 012116 NC

Wells Fargo Bank, N.A., Plaintiff v.
*Miles Christian Hart*¹, et al., Defendant²

Order Dates:

Orders of Judge Donnellan

Final Judgment of Foreclosure: April 7, 2015

Orders of Judge Iten

Denying Motion for New Trial:

June 8, 2016

Denying Amended Motion for New Trial:

June 8, 2016

Denying Motion for Leave to File Omitted

Counterclaim: June 9, 2016

¹ Other than the current circuit court judge (2019), the circuit court judges have spelled “Christian Hart” without a hyphen, but the 2nd DCA spells his name “Christian-Hart”. To avoid confusion, we refer to the Petitioner as “Hart” in this petition.

² The complete caption for the original foreclosure judgment was *Wells Fargo Bank, N.A.*, Plaintiff v. *Miles Christian Hart; the Unknown Spouse of Miles Christian Hart; Sarasota County; Sarasota Springs Community Association Inc.; Any and All Unknown Parties Claiming Through, Under, and Against the Herein Named Individual Defendant(s) Who Are Not Known Be Dead or Alive, Whether Said Unknown Party May Claim an Interest As Spouses, Heirs, Devisees, Grantees, or Other Claimants; Tenant #1, Tenant #2, Tenant #3 and Tenant #4 the Names Being Fictitious to Account for Parties in Possession*, Defendants.

Judge Iten entered an order of disqualification upon himself on June 14, 2016 and was replaced by Judge Mercurio.

Orders of Judge Mercurio

Denying Motion for Reconsideration:
February 23, 2017

Denying Motion to Clarify Ruling of
Predecessor Judge: March 1, 2017

Denying Motion to Refer to Law Enforcement:
March 2, 2017

Florida Second District Court of Appeal
Case Numbers: 2D16-2875, 2D17-1110
(Consolidated)^{3, 4}

Miles Christian-Hart, et al., Appellant v.
Wells Fargo Bank, N.A., Appellee

Per Curiam Order: September 12, 2018
Rehearing Denial Date: January 8, 2019

³ The appeals of Judge Donnellan's judgment of foreclosure and Judge Iten's orders are under Florida 2nd DCA Case Number 2D16-2875. The appeals of Judge Mercurio's orders are under Florida 2nd DCA Case Number 2D17-1110.

⁴ There is currently a collateral procedure pending in the Florida Supreme Court, *Miles Christian-Hart*, Petitioner, v. *Wells Fargo Bank, N.A.*, Respondent (SC19-481), which is a Petition for Writ of Mandamus requesting the Florida Supreme Court to order the Second DCA to recall, re-issue, and re-serve the mandate and per curiam opinion to the proper parties and counsel.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Miles Christian-Hart, respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal, Second District, State of Florida (App.1a.) and the denial of the motion for rehearing and for rehearing *en banc* thereon. (App. 25a).



OPINIONS BELOW

The District Court of Appeal, Second District, State of Florida, entered its per curiam affirmance of the consolidated appeal of the orders of the trial court below, without opinion, on September 12, 2018 (App.1a) and its denial of the motion for rehearing and for rehearing *en banc* thereon, without opinion, on January 8, 2019. (App.25a).



JURISDICTION

The District Court of Appeal, Second District, State of Florida, entered its amended denial of the motion for rehearing and motion for rehearing *en banc* of the per curiam affirmance on January 8, 2019, making the Petition due on April 8, 2019. Petitioner requested an enlargement of time to June 7, 2019, to file this Petition and the Court granted that

request. This Court has jurisdiction under 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISION INVOLVED

- **U.S. Const. amend. XIV, § 1**

Section 1 of the Fourteenth Amendment of the United States Constitution provides in part,

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .”



STATEMENT OF THE CASE

SUMMARY OF CASE

As the Second DCA did not issue an opinion, the undersigned is reviewing the facts in depth below but offers this quick summary. In 2005, Hart entered into a proposed loan with World Savings Bank which never closed. Under the HUD-1, payments were to be made to Wells Fargo to Regions and to Hart, but none were made, so, in this foreclosure action, Hart asserted lack of consideration, and Wells Fargo never provided proof any payments had been made. Hart had signed a note and mortgage prior to the closing in anticipation the loan would close. Those documents were recorded in error by the closing agent.

Having no proof the loan was funded, Wells Fargo committed fraud on the court. At trial, as to the Wells Fargo payment, it offered an unrelated release from General Mortgage to deceive the court into finding the Wells Fargo payment was made. As to Regions, it offered a release from Regions knowing it was rescinded as issued in error. Wells Fargo didn't include the releases on its exhibit list so Hart's lawyer could be prepared for the fraud. The fraud was especially blatant since Hart's lawyer had listed on Hart's exhibit list a judgment from Regions proving that no payment had been made. The court had ordered Wells Fargo to provide final discovery to Hart within 30 days, which was the day after trial, so the day before trial, Wells Fargo filed a request for continuance asking for more time, which Hart agreed to, and expecting the continuance to be granted, Hart did not bring a court reporter to the trial. This appears to have been a ploy because, as there was no transcript, Hart prepared a statement of the evidence to try to reach an agreed substitute. In response, Wells Fargo claimed that it was Hart who had requested the continuance which Wells Fargo had opposed. The court denied the motion and the trial went forward. However, even without a transcript, a judgment can be reversed for fundamental error like due process, and, under Florida law, due process may be raised for the first time on appeal. Even though Florida law requires a judgment of foreclosure be supported by the correct note and mortgage, Wells Fargo admits it never introduced nor had admitted the correct note and mortgage at trial. Instead, Wells Fargo states that it verbally requested the court to take judicial notice of the note and mortgage, al-

though, in Florida, one cannot take judicial notice of a mortgage, and, even if one could, such a request must be in writing.

Wells Fargo was using an old ploy in which a party circumvents the judicial notice rules by taking judicial notice of the court file—including the mortgage and note filed therein. Regardless, in this case, neither of the correct documents appear as trial evidence and the only note and mortgage admitted as trial evidence is for a loan between a Phyllis Savage with Bank of America. Not having a record to support the judgment violated due process as did setting the trial within 30 days. After the trial, the successor judge initially agreed to hear Hart's motion for a new trial, but, after the undersigned filed an amended motion for new trial and a motion for leave to file omitted counterclaim, the judge abruptly cancelled the hearing the day before, denying the motions, asserting the undersigned had never filed a notice of appearance. After realizing the undersigned had filed a notice of appearance, the court said it was also no good, as the formal notice of appearance had hit the e-file system five minutes later that day, making the pleadings a nullity, even though the five minute delay prejudiced no one, this was supposed to be a court of equity, and Wells Fargo's trial attorneys never filed a notice of appearance. This also violated procedural due process. That judge disqualified himself and the undersigned moved for reconsideration of his orders as a denial of due process. At the hearing before the final successor judge, Hart's counsel reminded the court that the first successor judge had never reached the merits. However, the

second successor judge ruled he was in agreement with the prior judge's orders.

THE FORECLOSURE CRISIS

Prior to the foreclosure crisis when foreclosures were rare, foreclosure Plaintiffs work was routinely assigned to attorneys who agreed to be placed on a list. While there were occasional disputes over evidence, there were no reported instances of attorneys in Florida knowingly presenting false evidence to obtain a judgment of foreclosure, and, in fact, a foreclosure action was regarded as one of the simplest to prosecute in all of litigation. In Florida, the Uniform Final Judgment of Mortgage Foreclosure begins as follows: "THIS action was tried before the Court. On the evidence presented . . ." Under Florida law, a trial court's decision to enter a Final Judgment of Mortgage Foreclosure is reviewed under the competent, substantial evidence standard. *See, Tibbs v. State*, 397 So.2d 1120 (Fla. 1981), holding there must be competent, substantial evidence to support a verdict or a judgment. In the context of a foreclosure action, Florida's District Courts have repeatedly dealt with the elements of a *prima facie* foreclosure case at trial. In *Figueredo v. Bank Esposito Santo*, 537 So.2d 1113 (Fla. 3d DCA 1989), the Third DCA noted that the Plaintiff had failed to produce for admission into evidence the original of a negotiable promissory instrument as "expressly required" by the Florida Evidence Code and thus found the final judgment of foreclosure had to be vacated. The leading Second DCA case of *Fair v. Kaufman*, 647 So.2d 167 (Fla. 2d DCA 1994), holds,

“In order to prevail in a suit on a note and mortgage, the original note and mortgage must be introduced into evidence or a satisfactory reason given for failure to do so . . . The record in this case does not indicate the original documents were offered and/or received into evidence. The appellees argue the original note and mortgage were filed and placed into evidence at the summary judgment hearing. This is not sufficient. The introduction of such documents at a summary judgment proceeding does not obviate the necessity for proper introduction at trial . . . The failure to introduce those original documents precludes the entry of a final judgment.”

In *Beaumont v. Bank of New York Mellon*, 81 So.3d 533 (Fla. 5th DCA 2012), the Fifth DCA held that a document that was contained in the record, but not offered into evidence at trial, was not “competent” evidence and could not be considered. In *Figueroa v. Federal Nat'l. Mortg. Ass'n*, 180 So.3d 1110 (Fla. 5th DCA 2015), the Fifth DCA held that a “document that was identified but never admitted into evidence as an exhibit is not competent evidence to support a judgment.” *See, also, Kelsey v. Suntrust Mortgage*, 131 So.3d 825 (Fla. 3d DCA 2014), holding even a default judgment requires the introduction of the proper documents.

Wells Fargo contends that its counsel verbally requested the trial court to take judicial notice of the note and mortgage which had been filed earlier with the clerk. However, this is not a “satisfactory reason” for a failure to introduce the proper documents at

trial and no Florida court has ever abided the taking of judicial notice of a mortgage. In *Bull v. Jacksonville Fed. Sav. & Loan*, 576 So.2d 755 (Fla. 1st DCA 1991), the First DCA held that mortgages are “not included in the list of matters which must or may be judicially noticed.” Even if one could take judicial notice of a mortgage, which one cannot, one must follow the statutory procedures, including meeting the due process requirement of providing notice to the adverse party. F.S. 90.203 of Florida’s Evidence Code requires that a party be given timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request. Further, if a court takes judicial notice, it must be made a part of the record and there is no “record” here of the request being made or granted. In *Sandefur v. RVS Capital, LLC*, 183 So.3d 1258 (Fla. 4th DCA 2016), the Fourth DCA cited *Bull* for the proposition that one cannot take judicial notice of a mortgage and also held that the parties and the Court must follow the statutory procedures before a document may be judicially noticed. Finally, as noted in *DiGiovanni v. Deutsche Bank National Trust Company*, 226 So.3d 984 (Fla. 2d DCA 2017), “judicially noticed documents must be otherwise admissible” citing *Stoll v. State*, 762 So.2d 870, 877 (Fla. 2000), holding, “(W)e find that documents contained in a court file, even if that entire court file is judicially noticed, are still subject to the same rules of evidence to which all evidence must adhere.” Thus, one cannot circumvent Florida’s Evidence Code by filing documents in a court file and then taking judicial notice of the filed document. In Hart’s case, the weight and sufficiency of the evidence to establish the loan was

funded was zero and the weight and sufficiency of the evidence of the note and mortgage at trial was also zero. In *Wolkoff v. American Home Mortg. Servicing, Inc.*, 153 So.3d 280 (Fla. 2d DCA 2014), the Court held that the weight and sufficiency of the evidence may be raised for the first time on appeal. Although one must ordinarily preserve an issue on appeal by presenting it to the trial court, “there is an exception to this general rule, however, where the trial court’s actions constitute fundamental error.” *See, Chiu v. Wells Fargo Bank*, 242 So.3d 461 (Fla. 3d DCA 2018) where a denial of due process was raised for the first time on appeal. In this regard, a judgment, not based on record evidence, is not only violative of Florida law, but of due process generally, and of controlling Supreme Court precedents. Thus, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the affected party was entitled to notice of a hearing before an impartial decision-maker, the opportunity to be heard at the hearing, the right to confront and cross examine witnesses, and the right to a statement setting out the evidence relied upon and the legal basis for the decision. *See, also, Fuentes v. Shevin*, 407 U.S. 67 (1972), dealing with procedural due process, and, *Hinton v. Gold*, 813 So.2d 1057 (Fla. 4th DCA 2002) holding,

“Due process demands that the defendant be given fair notice and a reasonable opportunity to be heard before judgment is rendered”

and

“Fundamental to the concept of due process is the right to be heard which assures a full hearing, the right to introduce evidence at a

meaningful time and in a meaningful manner, and judicial findings based upon that evidence. *Brinkley v. County of Flagler*, 769 So.2d 468, 472 (Fla. 5th DCA 2000)."

DUBIOUS PROOF IN THE SECOND DISTRICT

In 2011, Scot Paltrow wrote a special report entitled, *Banks Still Robosigning*, REUTERS, July 18, 2011, where the author noted that, "America's mortgage lenders vowed to end the dubious foreclosure practices that caused a bruising scandal last year" but the fraud was actually evolving, not ending. The acceptance of dubious proof has emerged as a recognized problem throughout Florida, but especially in the Second District, in which certain trial judges have had enough of strict compliance with evidence law. For example, in *Focht v. Wells Fargo Bank*, 124 So.3d 308 (Fla. 2d DCA 2013), the Second DCA dealt with the proof requirement of standing at the inception of a case, certifying the following question as being one of great public importance: "CAN A PLAINTIFF IN A FORECLOSURE ACTION CURE THE INABILITY TO PROVE STANDING AT THE INCEPTION OF SUIT BY PROOF THAT THE PLAINTIFF HAS SINCE ACQUIRED STANDING?"

In that case, former Judge Altenbernd stated that he concurred "in this decision because existing precedent requires me to do so" but that,

"Presumably, our mandate requires the dismissal of this foreclosure action, which in turn will undo the foreclosure sale. Ms. Focht will regain possession of her property and apparently continue her free use of the duplex while the lender continues to make

advances to cover the expenses typically paid from escrow. Our certified question of great public importance is dispositive of this appeal and worthy of consideration by the Supreme Court.”

The Florida Supreme Court did not find the question worthy. In any case, dubious proof continued to be such a problem within the Second DCA that four years later, former Second DCA Chief Judge Villanti offered his own views in *Shaffer v. Deutsche Bank National Trust*, 253 So.3d 943 (Fla. 2d DCA 2017), where a bank had offered no evidence to establish it owned the note on the date it filed the foreclosure complaint, and thus failed to prove it had standing. Judge Villanti offered recommendations based on his observations “from the flood of foreclosure litigation that this court has reviewed in the past few years” noting in his second recommendation that it would behoove the legislature to consider legislation requiring foreclosure defendants “who wish to raise any defense other than payment to pay the amounts required by the note and mortgage into the court registry” as

“It appears that many foreclosure judgments are entered based on dubious proof by the banks due to an understandable lack of sympathy for defendants who are years behind on payments and who are raising what appear to be spurious delaying defense tactics. Requiring foreclosure defendants to make their payments into the court registry would alleviate the temptation to excuse strict compliance with the laws of evidence.

This method has been successfully utilized in tenant eviction cases in which tenants are free to raise defenses to an eviction, but may not do so while at the same time refusing to pay rent . . . Using chapter 83 as a template, the legislature could address the foreclosure backlog and ensure that foreclosure cases would be expedited without sacrificing due process.”

FLORIDA’S FORECLOSURE MILLS

Foreclosure work is now largely handled by a limited number of foreclosure firms. In Gretchen Morgenson and Geraldine Fabrikant’s article, *Florida’s High Speed Answer to a Foreclosure Mess*, THE NEW YORK TIMES, September 4, 2010, then Florida Attorney General McCollum identified three law firms—Law Offices of Marshall C. Watson, Shapiro & Fishman, and the Law Offices of David J. Stern—as being foreclosure “mills” and that,

“They submit false documents, fabricate the documents, or the documents actually don’t exist. They wanted to speed the process up because the faster they get the foreclosures done the better.”

With the emphasis on speed, the mills found a perfect place to practice in Florida’s rocket dockets. In that article, David Stern, known as America’s foreclosure king, said, “I can’t speak for the other firms, but I can assure you that there has not been submission of fraudulent documents. We feel a lot of it is politically motivated. We have done nothing wrong and are going to cooperate fully.” Two months later however, in November, 2010, Stern’s connec-

tions with Fannie Mae and Freddie Mac were reportedly severed, and though eventually disbarred, Stern still had the trappings of success of every foreclosure king and queen. *See, Bandell, Brian, Palace of the Foreclosure King: See Inside Ex-Attorney David Stern's Fort Lauderdale Mansion, Listed at \$32M, THE RANDLE REPORT, September 17, 2015.* When it came to law enforcement, the foreclosure mills became largely untouchable. *See, for example, Miller, Kimberly, Foreclosure Mills in the Clear; Florida Closes Cases With No Findings, PALM BEACH POST, October 5, 2012,* explaining how McCollum's successor as attorney general had fired the top two investigators and which specifically names the trial law firm herein—Albertelli Law—as a foreclosure mill under investigation. Although much has been written about the mills, much has also been written about the banks, including Wells Fargo, which had specially developed a manual to deal with its foreclosures.

Although numerous articles have been written, a few recent items will be mentioned here: Lane, Ben, *Houston Couple Wins \$4.5 Million in Foreclosure Fraud Suit Against Wells Fargo: Sometimes David Beats Goliath*, HOUSING WIRE, December 10, 2015; Morgenson, Gretchen, *Wells Fargo is Accused of Making Improper Changes to Mortgages*, THE NEW YORK TIMES, June 14, 2017; Paul, Kari, *Wells Fargo Accidentally Foreclosed on More Homes—What You Should Do in a Similar Situation*, MARKET WATCH, August 7, 2018; Koren, James, *Wells Fargo Foreclosed on 400 People Who May Have Had a Chance to Keep Their Homes*, LOS ANGELES TIMES, August 3, 2018; and Egan, Matt, *I Begged Them for Help: Wells Fargo*

Foreclosure Nightmare, CNN BUSINESS, December 12, 2018.

THE FORECLOSURE MILLS AND JUDICIAL NOTICE

The mills had long been challenged over one issue. Since certain of its offered documents might possibly be fake, the idea was to create as much distance as possible between the fakes and themselves, not to mention the court. The answer came with judicial notice, but to do so required breaking a few laws. First, the mill would have to convince a judge that a court could take judicial notice of a mortgage. Second, the mill would have to convince the judge it could do so verbally. For the mill, the win was twofold. First, this would offer the element of surprise, but, also, the mill wouldn't want to put such a facially illegal request in writing with the obvious purpose of circumventing the law. A person would wonder why, given the originals were already in the court file, what motive there would be for not wanting to introduce them at trial. One excuse offered was that doing so would somehow save the clerks "labor" as if transporting the originals to the courtroom was a monumental effort. In the instant case, the trial court not only agreed to take judicial notice, but to do so verbally, she said, to help out the clerks.

WELLS FARGO VERBALLY REQUESTS TO TAKE JUDICIAL NOTICE

In response to the Defendant's statement of the evidence, Wells Fargo explained how it was using (or misusing) judicial notice. Wells Fargo counsel noted that Plaintiff had earlier filed the note and mortgage, and, "At trial, Plaintiff requested the Court take judicial notice of the original documents and admit them

into evidence as they appear in the Court's file." Then, at the hearing to settle the record, Wells Fargo's counsel said, "The original documents have previously been filed with the Court. And during the trial, there was no admission of a note and mortgage—a physical admission, other than asking—telling the Court that the original documents were previously filed and asking the Court to take judicial notice of them and admit them into evidence." Later, at the same hearing, its counsel said, "And opposing counsel stated that I did not make a request for judicial notice. As part of my questioning in the trial, your Honor, when an original document has been filed with the Court, I will ask the Court to take judicial notice of it and admit it into evidence as it appears in the Court's record. And that's what took place in this case." As to the wrong note and mortgage being "admitted" in evidence, she stated,

"And the original documents were previously filed. The clerk made an error and took the original documents from another case that was in front of the Court and also admitted that into evidence as well."

There was one big flaw. Even if it were legal to take verbal judicial notice of a mortgage, which it isn't, that doesn't admit documents in evidence so at least copies of the note and mortgage would have to be introduced and admitted in evidence, but no such documents were in the evidence record here. At oral argument, on August 29, 2018, the merits panel hammered Wells Fargo on this issue as it goes to the fundamental fairness of the trial. They wanted to know if the judgment was based on the Savage docu-

ments or on the Hart documents. Based on the responses, a PCA was decided that day, but it was not entered for two weeks. Not knowing the PCA had already been decided, the parties entered into a stipulation to clarify for the merits panel prior to issuing its decision, that neither the correct original note and mortgage nor copies thereof, were in the evidence record. That was clearly responsive to the issues raised at oral argument. After the PCA was issued, the undersigned moved for a rehearing stating that, as a matter of procedural due process, it was critical for the merits panel to have considered the stipulation. The undersigned went further in the motion for rehearing en banc stating that Wells Fargo's appellate counsel confirmed the correct note and mortgage had not been introduced at the foreclosure trial. In response, Wells Fargo counsel stated in a footnote in its response that, "However, counsel for Wells Fargo has never stated that Wells Fargo did not introduce a copy of the Note and Mortgage at Trial and no transcript of the Trial exists to determine whether a copy of the Note and Mortgage were actually admitted at Trial." For the first time, Wells Fargo was putting in writing what was being insinuated at oral argument, that it had introduced the copies and we don't know if they were admitted at trial. While originals are preferable, as Wells Fargo said it had introduced copies, that would be more probative of fundamental fairness and due process on this issue. The only problem was that it was completely false. In fact, Wells Fargo's trial counsel had said that no such documents were physically offered at trial. This means no such documents could have been admitted either. This was the last plead-

ing before the full court would rule. The undersigned filed a motion for leave to reply noting in the reply that Wells Fargo had changed its story and, “The full membership of the Second DCA must be made aware of what is at stake here.” However, the merits panel struck the Reply so the full Court never saw it. All they saw before they issued the denial of the motions for rehearing, was a notice of withdrawal of statement filed by Wells Fargo after the merits panel had struck the Reply, but the undersigned had been denied a full opportunity to be heard on this issue. To recap, it is undisputed the trial court herein allowed Wells Fargo to verbally request the trial court to take judicial notice of the documents. As Judge Donnellan put it to the undersigned at the hearing to settle the record,

“You can make that argument to the appellate court. It was standard operating procedure, as a matter of fact, the original documents had to be filed before the trial. There was a check-off list that said they had to be filed before. Check off list showed they had been filed in every case. So the Court took judicial notice rather than having the clerk bring over the original documents. So I’m not getting into that argument. That’s for the appellate court.”

While her procedure was facially illegal, it also made no sense, as copies would still have to be introduced in the record. Thus, even accepting Wells Fargo’s version of events, what it had done was to verbally request the court to take judicial notice of the note and mortgage, but still offer no documents whatso-

ever, in contravention of Florida law, which is what the merits panel was driving at. This is why the stipulation was needed to clarify that nothing was in the record to support the Hart judgment. As a matter of fundamental fairness, as well as due process, the merits panel was obliged to reverse once it determined there was no record evidence to support the judgment. Affirming in this scenario was facially violative of due process.

DUE PROCESS VIOLATIONS

As noted, a due process violation constitutes fundamental error under Florida law and may be raised for the first time on appeal. In this case, the failure to provide proper notice of the trial constituted a due process violation under Fla. R. Civ. P. 1.440, the failure to provide record evidence supporting the judgment violated due process, and, as will be seen below, the failure to provide an opportunity to be heard as to the post judgment motions, all violated due process.

RULE 1.440

Fla. R. Civ. P. 1.440(c) provides a trial date shall be set not less than 30 days from the service of the notice but here the trial was set for 29 days. As noted on page 5 of the initial brief, “This requirement of due process is well established.” As noted, this is a due process issue and may be raised on appeal and is related to the denial of the continuance. That is, on March 9, 2015, the trial court only allowed 29 days before the trial but did allow 30 days to respond to the discovery. However, Hart was never provided his promised discovery. In its answer brief, Wells Fargo tried to point to cases where such a violation is minor

ignoring *Mourning v. Ballast, Nedam Construction, Inc.*, 964 So.2d 889 (Fla. 4th DCA 2007), stating the “order setting the case for trial shall give at least 30 days’ notice from the entry of that order to the trial date itself”, *BAC Home Loans v. Parrish*, 146 So.3d 526 (Fla. 1st DCA 2014) holding it to be reversible error to set a trial 28 days later, making the judgment defective, and *Wells Fargo Bank, N.A. v. Sawh*, 194 So.3d 475 (Fla. 3d DCA 2016), where Wells Fargo complained about violation of its Rule 1.440 rights, and without a transcript, the court therein held the trial court was required to provide Wells Fargo the 30 days’ notice.

THE TRIAL AND THE POST TRIAL MOTIONS

In 2016, the foreclosure sale was set for May 12, 2016, and the undersigned spoke with Hart who said he had not been notified of that hearing. A review of the file showed that judgment had been entered by Judge Donnellan on April 7, 2015, where Hart was represented by counsel, who withdrew afterwards. On April 17, 2015, Hart timely filed a pro se motion for new trial on the basis that the court had forced the defendant to go to trial despite outstanding discovery violations by Wells Fargo. Briefly, in 2005, Hart had entered into a proposed loan with World Savings Bank, a bank subsequently acquired by Wachovia Bank, which was itself acquired by Wells Fargo. The closing was to be handled by a local attorney (Finkelstein). According to the proposed HUD-1 \$85,721.28 was to be disbursed to Wells Fargo, \$53,753.73 was to be disbursed to Regions Bank, and \$21,262.29 was to be disbursed to Hart directly. The disbursements were due to be made on December 5,

2005, but the loan did not close. Hart had earlier signed the note and mortgage in anticipation the loan would close. (Hart was out of town on the closing date). Finkelstein has stated that the closing documents were recorded in error but forwarded on to World. Hart states that he was assured by World that the matter would ultimately be straightened out, with a new loan closed, and that he should continue to make payments to protect his credit. However, the matter was never straightened out, so in 2010, Wells Fargo filed suit to obtain a foreclosure. Hart's principal defense was one of lack of consideration, and, during discovery, Hart requested proof that the proposed HUD-1 payments had been made, asking,

“Question 5: Produce copies of the front and back of any and all checks indicating disbursement of funds resulting from the settlement of November 29, 2005.

“Response 5: Objection, not likely to lead to admissible evidence. The request is not relevant to breach of contract that occurred. Notwithstanding and not waiving the aforementioned objection, please find a copy of the payment history attached hereto.”

Wells Fargo knew that it had not received any payment, and would always change the subject to observe that Hart had made some payments on the loan. However, as noted, mistakenly making payments on a loan proves nothing as the note and mortgage had been recorded and forwarded to World in error. On March 1, 2015, Hart filed a further motion to compel noting that one “Val Riddle” had been listed as Wells Fargo’s witness but no information had been provided about

her. On March 9, 2015, Judge Donnellan issued a series of rulings. She granted the motion to compel ordering Wells Fargo to provide the information about the witness but hand wrote in that same order that there “shall be no more discovery propounded by the Defendant” and set trial for April 7, 2015. Also, prior to trial, Wells Fargo had been contacting Hart directly, although represented by counsel, and Hart filed a motion to prohibit Wells Fargo from contacting Hart directly. Wells Fargo opposed the motion and it was denied.

On March 26, 2015, Wells Fargo served its amended witness and exhibit lists. The witness list replaced “Val Riddle” with a “Torrie Scott” while the exhibit list was a boilerplate list of documents Wells Fargo said it would introduce at trial, including the note and mortgage. Hart, in turn, listed two exhibits on his list, the proposed HUD-1 and the court docket in 2010 CA 009249NC, which was the case where Regions Bank had sued Hart as it had not been paid a penny. As Riddle had been replaced by Scott, Hart filed a motion in limine to exclude her as he had been denied the opportunity to take her deposition. The day before the trial, April 6, 2015, however, Wells Fargo served a “motion to continue non-jury trial” noting that the period to respond to Hart’s discovery (30 days) had not elapsed, and, as such, the April 7, 2015 “trial should be continued to allow Plaintiff the time provided by the Order to comply.” Again, Hart agreed to this motion, and, expecting the unopposed Wells Fargo motion to be granted, did not bring a court reporter to the trial. As it happened, Judge Donnellan denied the motion in limine and the motion to continue and the trial went forward. It is

undisputed that Judge Donnellan permitted Scott to testify and that two releases were admitted as Plaintiffs evidence, that neither release had been disclosed by Wells Fargo on its exhibit list, all to establish the mortgage loan had been consummated. To show that Regions had been satisfied, Wells Fargo introduced a release from Regions Bank where it acknowledged that it had “received full payment and satisfaction” of the same but offering this release was deceptive as, in a related instrument, Regions stated the release had been issued in error, and was void, Regions having been paid no funds whatsoever. Wells Fargo also misled the court with another release it had found issued by General Mortgage Corporation and returned to Hart directly, which bore no connection to this case. Also, back in 2012, Wells Fargo had filed a notice of filing the purported Hart original note and mortgage. Although Wells Fargo had listed the note and mortgage on its exhibit list as documents it would introduce at trial, Wells Fargo failed to introduce the note and mortgage at trial, although the court did admit as trial evidence the note and mortgage for an unrelated loan with Bank of America in which a Phyllis Savage was the borrower. Judgment was entered without any record evidence, admitted or otherwise, of the Hart note and mortgage.

Following the judgment, Hart’s trial counsel withdrew, and Hart filed a motion for a new trial on the basis that “the court forced the defendant to go to trial despite outstanding discovery violations by the plaintiff.” Hart had no way of knowing that the witness just added would be used to introduce the releases never disclosed in Wells Fargo’s list. In 2016, Wells Fargo filed a motion to set a foreclosure

sale date which was heard by a successor judge (Iten) on March 31, 2016, at which the court granted the motion and set the sale for May 12, 2016. Having not been aware of this, Hart did not attend the hearing. The undersigned was then retained on behalf of Hart and filed a motion to set aside and vacate the foreclosure sale noting that Hart had not received notice of the hearing and further that he had a pending motion. The undersigned also filed an agreed notice of hearing for May 6, 2016. At the bottom of each, the undersigned was listed as "Attorney for Defendant Hart." On May 6, 2016, Judge Iten granted the motion and cancelled the sale and set Hart's motion for new trial for June 10, 2016, at 8 am, for one hour. At the May 6, 2016, hearing, Hart testified that he and his prior attorney had gone to the trial and "we thought that that was going to be a continuance. Judge Donnellan decided to do trial. So I didn't have a court reporter there or anything because we thought we were just going up for a continuance." Hart explained that he had filed the motion for new trial because "I felt that my due process was being, you know—discovery had never been met." On June 1, 2016, the undersigned e-filed two motions with the court—a motion for leave to file omitted counterclaim which stated that Wells Fargo had been aware that the proposed loan was never consummated and Hart was led to believe that if he continued to make payments, the matter would be straightened out and the payments returned to him, although, in fact, Wells Fargo had wrongfully retained the payments and wrongfully sought foreclosure for a property to which it was not legally entitled. The amended motion for new trial noted that, in addition to the original basis for a

new trial, two grounds should be added in that the loan was never funded and Wells Fargo had failed to make a *prima facie* case (as the proper note and mortgage had not been produced at the trial). The undersigned noted therein that a timely motion for new trial may be amended to state new grounds in the court's discretion at any time before the motion for new trial is determined.

At the May 6, 2016, hearing, Judge Iten had stated, "I'm not going to take any more evidence. We're done with the evidentiary portion of the hearing" refusing to allow the undersigned to finish saying, "I'm going to grant the motion. And this is what needs to be done. We need to get this motion for new trial heard" and the court set that date for June 10, 2016, which was reset by the Court's judicial assistant to June 8, 2016. The undersigned received a call from the court's judicial assistant on June 7, 2016, to notice the hearing for June 9, 2016, at noon. Having received agreement from opposing counsel, the undersigned filed an agreed notice of hearing for June 9, 2016, listing all three pending motions. On June 8, 2016, however, the undersigned discovered that Judge Iten was cancelling the hearing and the Court issued three orders. In his initial order, the Court denied Hart's pro se motion without any explanation and denied the amended motion for new trial asserting that the undersigned had "never" filed a notice of appearance, thereby making the motion a "nullity." This was the case notwithstanding the undersigned having indicated in earlier pleadings he was attorney for Hart, and, at the hearing itself, specifically stating that he was Hart's attorney putting the court and the parties on notice of the same. That

is, at the May 6, 2016, hearing, the undersigned said, "I'm Steven Fox. I represent the Defendant, Miles Hart." In the original order, the notice of appearance issue was the sole basis for denying the amended motion with the Court citing *Pasco County v. Quail Hollow Properties, Inc.*, 693 So.2d 82 (Fla. 2d DCA 1997), in support.

Following the receipt of the first order, the undersigned telephoned the Court's assistant and explained the undersigned had on numerous times entered a notice of appearance and had even filed a formal notice of appearance on June 1, 2016, at the beginning of the motion for leave to file omitted counterclaim which read, "The undersigned enters his appearance herein." Judge Iten then issued an amended order still denying Hart's motion for new trial without any explanation, and, again, without Hart having been permitted to complete his case, and issued an amended footnote claiming the undersigned's pleading was still a nullity as the notice of appearance was not filed "prior to or contemporaneous with the filing of the amended motion." The undersigned examined the motions and realized that the motion containing the notice of appearance which had been intended to be filed first went second by five minutes. That is, the notice of appearance entered the system at 6:54 pm while the amended motion for new trial entered the system at 6:49 pm. Both motions were filed together and contemporaneously however. Florida law provides how time is to be computed and there is no requirement a pleading be filed by a given minute or second to be given effect. Was the court seriously suggesting that a five minute delay in a formal notice of appearance which preju-

diced nobody in a court of equity would be a basis for nullifying a pleading so a client could lose his home? No court in American history has taken such a position. Moreover, the undersigned read *Pasco County*, in which a notice of appearance had been filed on a much later date, not five minutes later on the same date. In *Pasco*, the Second DCA had stated,

“The motion to dismiss that attorney Orcutt filed on February 20, 1996, a date when he had not yet filed a notice of appearance was, therefore, a nullity.”

The operative word is date, not minute, as in the present case, both motions were filed on the same date and together, just five minutes apart. In *Hicks v. Hicks*, 715 So.2d 304 (Fla. 5th DCA 1998), the Fifth DCA declined to follow *Pasco County* altogether stating that, “once full compliance with the rule has been accomplished . . . a better view of the situation would be to hold that the pleadings filed on the client’s behalf are legally effective, retroactively, or *nunc pro tunc*” and, in *Hartley v. Comerford*, 2014 WL 241759 (U.S.D.C. N.D. Fla. 2014), Chief Judge Rodgers wrote that the “*Hicks* rationale, which seems sensible and pragmatic is the better approach.” As the undersigned has stated repeatedly, there are no “magic words” needed to constitute a notice of appearance in any case and even the prior notations had sufficed. As the Third DCA noted in *Rand v. Paul*, 807 So.2d 191 (Fla. 3d DCA 2002),

“Although counsel did not file a formal notice of appearance, an appearance may be found even in the absence of any filings when an attorney shows up for a hearing . . . *See, e.g.*,

Florida Public Service Comm'n v. Pruitt, Humphrees, Powers & Munroe Advertising Agency, Inc, 587 So.2d 561, 562 n 2 (1st DCA 1991). A notice of appearance is merely a convenient way of placing counsel's name and address on the record. *Weatherhead v. Coletti*, 392 So.2d 1342, 1344 (Fla. 3d DCA 1980)."

As Judge Padovano notes in his treatise, *Fla. Prac. Civil Practice* (West 2017), in the section entitled "appearance" that,

"The filing of a pleading or court paper by a member of the bar on behalf of a party generally constitutes an appearance as counsel for that party" and that

"There is seldom need to file a formal notice of appearance in a civil case. Under Florida law, the filing of any paper on behalf of a party is regarded as an appearance as counsel for that party."

Moreover, no attorney for Albertelli Law had ever filed a notice of appearance in the case. In the original order, the sole basis for denying the amended motion was the purported non-filing of a notice of appearance, but, in his amended order, the Court added that the "belated filing of the motion is unfairly prejudicial to Plaintiff." If this was actually a basis for the denial, why wasn't this included in the original denial? Also, Wells Fargo had never responded to the motions, much less asserted it was prejudiced; the Court was simply asserting it on Wells Fargo's behalf, and without hearing from the parties, making a finding of prejudice. Even had there been a new trial, there was no basis for prejudice as there

had been no changes in the facts since 2015. The Plaintiff couldn't prove the loan was funded then and couldn't prove so now. As to the failure to make a *prima facie* case, the original note and mortgage are still in the court file, and if the Plaintiff can make a *prima facie* case, it could do so now. As the undersigned stated in his proffer, "the only sense that Wells Fargo could possibly be 'prejudiced' herein is the 'prejudice' faced by any fraudster. If a fraudster perjures himself in court and there is to be a retrial, there is 'prejudice' in the sense that at the new trial, at which there will be a court reporter present, and Wells Fargo won't be so fortunate." In any case, a judge is supposed to be impartial and not advance suggestions not found in the pleadings. Of note, in the trial court's denial of the motion for leave to file omitted counterclaim, the court goes point by point mentioning the five minute delay asserting that, as he was denying the amended motion, he was denying the motion for leave as well. That didn't even make sense since the motion for leave did contain a notice of appearance. Again, as noted in *Pasco County*, the purpose of such a notice is to provide "notice to all that he or she acts on the client's behalf and has authority to bind the client." Oddly, when Judge Iten added the prejudice issue in the second order, he used the word "and" meaning that both had to be true. Thus, Judge Iten must be correct on both grounds to declare the motions a nullity. More oddly, in his third order, Judge Iten dropped the prejudice argument entirely. The undersigned moved to disqualify him which was granted and the undersigned then filed a motion for reconsideration. In that motion, the undersigned noted that under *Sunrise Gift*

and Souvenir, Inc. v. Marcotte, 698 So.2d 345 (Fla. 5th DCA 1997), the rule does not limit the scope of a successor judge to new matters and so a motion for reconsideration is not analogous to a motion for rehearing. The undersigned sought reconsideration of all of the orders stating,

“In each and every instance, the trial court failed to provide an opportunity to be heard and violated fundamental due process. As to the Motion for New Trial, this Motion was based on the trial court’s failure to provide discovery necessary for a fair trial. As to the Amended Motion for New Trial, this added two additional grounds for a new trial, that the purported mortgage was not funded and that the Plaintiff had failed to make a *prima facie* case. In fact, the evidentiary record is clear that the trial court had admitted evidence herein related to a loan from another borrower (Savage) at an entirely different bank (Bank of America). As to the Motion for Leave to file Omitted Counter-claim, this motion was simply intended to allow the Defendant to recover the amounts justly owed. Each of the above described motions should have been heard and granted and the Defendant seeks reconsideration herein.”

The case was reassigned to Judge Curley who ordered Wells Fargo to respond. Its response asserted that Florida law permits only a single post judgment motion for rehearing; it said when the motion was denied, it is not subject to reconsideration because

the trial court loses jurisdiction when it denies the motion. In its response, Wells Fargo also stated, “the above styled cases concern motions for rehearing, there can be no rationale as to why a motion for reconsideration would provide an additional opportunity for litigation.” Then, Wells Fargo noted that while a trial court may reconsider a non-final order, the courts are not required to exercise that authority and that “a motion for reconsideration may be filed at any time until the entry of Final Judgment.” Wells Fargo asserted that, as to due process,

“Defendant alleges that the trial court failed to provide an opportunity to be heard and that the Defendant was deprived of fundamental due process. However, Defendant does not cite any Florida Rule of Civil Procedure or appellate authority that requires a hearing on the motions.”

None of these points had merit. First, Wells Fargo was clearly confusing a motion for reconsideration following disqualification with a motion for reconsideration of a non-final order. As noted in *Schlesinger v. Chemical Bank*, 707 So.2d 868 (Fla. 4th DCA 1998), in which a successor judge had denied a motion “because he was of the view that a successor judge cannot vacate a final judgment entered by a prior judge. That conclusion was incorrect.” The Fourth DCA stated therein,

“A final judgment entered by a judge who was later disqualified is, like any other order, subject to being reconsidered by a successor judge.”

On the issue of final v. non-final orders, as noted in *Wick v. Spector*, 562 So.2d 402 (Fla. 3d DCA 1990), where Spector had filed a motion for rehearing, and the Court said,

“This was in reality a motion for reconsideration which the trial court had the authority in its discretion to consider because it retains control of its own interlocutory orders prior to the entry of final judgment.”

This is an entirely different type of motion for reconsideration. As to due process, the point was that the trial court was explicitly denying an opportunity to be heard for improper reasons, highly probative of partiality, and violative of due process. The reconsideration hearing was held on February 22, 2017, with another attorney representing Hart at the hearing; prior thereto, the undersigned had filed a comprehensive proffer based on the undisputed facts going through each of the orders under reconsideration. After the hearing, the Court avoided discussion of any of the issues by ruling however,

“A motion for reconsideration is directed to a ‘non-final’ order and its sole purpose is to call to the attention of the court any error, omission, or oversight that may have been committed during the hearing and/or the preparation of the judge’s order. This Court finds no such error, omission or oversight has occurred and thus affirms and adopts the Orders so entered.”

The use of the word “such” was erroneous since, in fact, the Court could reconsider any order of the disqualified judge. The undersigned moved for clarifica-

tion, and, in the new order, the Court dropped the final v. non-final issue, and stated that, "This Court agrees with Judge Iten's Orders and adopts said Orders as its own." Thus, exactly two judges in American history have agreed a five minute delay in filing a notice of appearance supports declaring the pleadings a nullity, and both are in this case. After the first two orders were entered, the undersigned moved the court to refer the issue of fraud on the court to law enforcement, which the court denied, even before the undersigned could advise it of Wells Fargo's position on the matter, which it opposed.

WHERE DUE PROCESS WAS RAISED BELOW

Due process was raised at the trial by Hart, and at the 5/6/16, hearing, and the 9/13/16, hearing on the basis he had not been provided his discovery. The undersigned raised due process in the 6/23/16 motion for reconsideration in that the defendant was improperly denied an opportunity to be heard as to the Hart motion, the amended motion for new trial which alleged the loan was not funded and no prima facie case had been made at trial, and, in fact, a judgment entered for which a Phyllis Savage was the borrower, rather than evidence related to this loan, supported by an 11/2/16 additional memorandum, and a 2/20/17 proffer, in the summary of argument and argument section of the initial brief, and responsively in the reply brief, as well as the motion for rehearing/rehearing en banc, and the stricken reply. At oral argument, the focus of the merits panel was one of fundamental fairness, resulting in the post oral argument stipulation, a motion to relinquish, motions for rehearing/rehearing en banc, and the stricken reply

all dealing with due process. Rule 1.440 was discussed in the initial and reply briefs, and post oral argument, in the motion for rehearing/rehearing en banc, and in the stricken reply.



REASONS FOR GRANTING THE PETITION

1. Granting the petition will avoid a travesty of justice as to Hart. In this case, it is undisputed that Hart did not benefit to the extent of one penny. Not only has a judgment been entered against him but he is also facing the Regions Bank judgment which wasn't satisfied out of the proposed loan proceeds. Wells Fargo defrauded the court with deceptive releases and obtained a judgment completely devoid of any evidentiary record to support the judgment. That is, no competent, substantial evidence supports this judgment of foreclosure.

2. It will deter much of the abuse extant in Florida foreclosure proceedings. There isn't even a pretense of impartiality in some of these actions nor even a pretense of due process. The banks already have an enormous financial advantage over the defendants, but that's not enough for them, with one standard of due process for the banks and another standard of due process for the rest. This case has a series of firsts, first time a bank allowed direct contact with a represented client, first time a five minute delay is used to strike pleadings, first time a judgment is entered with evidence in the record related to undisclosed releases being highly probative of fraud, and, first time a signed judgment based on

the “evidence presented” is entered without a scintilla of such evidence in the record. Everyone is banking on the fact that this Court takes so few cases. As former Judge Altenbernd put it in *Davis v. State*, 953 So.2d 612, 614 (Fla. 2d DCA 2007),

“Mr. Davis attempted to have the United States Supreme Court review our affirmance. That Court does have the power, by writ of certiorari, to review a decision from a Florida District Court of Appeal even when no written opinion is issued. That power is very rarely exercised.”

In fact, at the hearing held on May 21, 2019, before the current trial judge, as to the merits of a stay, while the current trial judge agreed as to the likelihood of harm to Hart if the stay were not granted, as to the likelihood of success on the merits, he noted candidly that,

“As far as the likelihood of success on the merits, I cannot find that Mr. Christian-Hart has any appreciable likelihood of success, and let me explain why. He has raised issues that we talked about today, and we talked about the last time we were in this hearing on April 22, 2019, about the alleged violation of due process, and this issue has been presented by multiple—to multiple judges of the Twelfth Judicial Circuit and to the Second District and presumably will be presented to the U.S. Supreme Court. The U.S. Supreme Court hears a hundred cases a year, nationwide. This, from the Second District, is a per curiam affirmed decision and

so the U.S. Supreme Court would not only have to be interested, they would have to get interested without a decision written by an appellate court, and I just don't see that happening. And so I—realistically, you know, Mr. Christian-Hart has the right to request that the Supreme Court of the United States review his case, I cannot conclude that there's any likelihood of success."

However, this case is much more significant than as to Hart individually. These evidentiary shortcuts may hurt homeowners but once courts abide such shortcuts, where will it end. The mills have now succeeded in getting a judgment without record evidence. It won't end with foreclosures.



CONCLUSION

The Petition should be granted and summary reversal may be appropriate.

Respectfully submitted,

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