IN THE
MISSOURI SUPREME COURT

DAVID AND CRYSTAL HOLM,

Plaintiffs/Respondents,

v.

WELLS FARGO HOME MORTGAGE, INC., et al.,

Defendants/Appellants.

Appeal from the Circuit Court of Clinton County, Missouri
Honorable R. Brent Elliott, Presiding

No. SC95755

SUBSTITUTE BRIEF FOR RESPONDENTS DAVID AND CRYSTAL HOLM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page No.**

Statutes and Rules of Procedures

Other Authorities

INTRODUCTION

On August 15, 2008, loan servicer Wells Fargo foreclosed on the family home of David and Crystal Holm (Holm), and their 12 year-old daughter, Liberty.

The story of the foreclosure sale centers on events in the spring and summer of 2008. Following a severe storm in Holt, Missouri in the spring of 2008, Holm's property insurance carrier sent a check in the amount of $4,467.74 to cover the necessary home repairs. The check was made payable to Wells Fargo and David and Crystal Holm. Holm sent the check to Wells Fargo to obtain its endorsement, but Wells Fargo refused to endorse it or return it. Wells Fargo also refused to apply the funds to Holm's loan. Holm protested and began to dispute the validity of the debt alleged by Wells Fargo due, in part, to Wells Fargo's failure to return the check or apply the funds to the loan.

Wells Fargo responded by mailing David a copy of the note it was seeking to enforce. The note mailed by Wells Fargo identified debt to Commercial Federal Mortgage Corp., but contained no endorsements and was not enforceable by Wells Fargo or Freddie Mac. See Federal National Mortgage Association v. Bostwick, 414 S.W.3d 521, 525 (Mo. App. W.D. 2013) (Fannie Mae was the holder under section 400.3-301 because it presented evidence that the note was endorsed to it and it was in possession of the note).

David tried for months to save his family's home from foreclosure. Finally, at approximately 7 p.m. on August 14, 2008—the evening before the scheduled foreclosure sale set for noon on August 15 – David was told by a Wells Fargo representative that the foreclosure sale would be cancelled if he would make arrangements to pay $10,306.94 to reinstate the loan. David enthusiastically agreed to do so, and the following morning met his mother at her bank to obtain $10,306.94 in certified funds. Wells Fargo agreed to postpone the foreclosure sale, and David performed his side of the deal.

David also visited his physician on the morning of August 15 due to panic attacks and a deteriorating health condition, which required a hospital visit and attachment of a heart monitor. Nonetheless, David strictly followed the instructions from Wells Fargo and the trustee by faxing a copy of the certified check to the trustee on August 15, and sending the original certified check by Federal Express to the trustee's St. Louis office. [Suppl. L. F. 138-39]

It wasn't enough. Wells Fargo foreclosed anyway and sent the check back because it erroneously claimed the check was received four and one-half hours late. The experiences of the Holm family are a microcosm of larger trends. August of 2008 is "when people got scared" about the national housing market and bank conduct. <u>See</u> <u>The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States</u>, at 293 (Jan. 2011). Three weeks after the Holm foreclosure, Freddie Mac and Fannie Mae were placed into conservatorship to protect the safety and soundness of two government sponsored enterprises whose mission was to protect homeowners and the mortgage market. This historically significant moment in our nation's economic life played out in devastating ways for the Holm family.

The story of the litigation also centers on Wells Fargo. Wells Fargo directed the litigation before and during trial. It refused to produce documents despite orders to do so from Judge Elliott and special master Shafer. It refused to appear at a deposition notwithstanding its prior agreement to do so, and an order to appear from special master Shafer. On two separate occasions, Wells Fargo made what the trial court described as "intentional misrepresentations" of fact during oral argument on motions.

Defendant Freddie Mac was not consulted about its written discovery answers before they were served and signed by Wells Fargo, and Freddie Mac's designated corporate witness testified that several of the discovery answers served on its behalf were false. One of the documents sought in discovery, Freddie Mac's 2008 servicing agreement ("SA"), was available at Freddie Mac's office in Maryland, even though Wells Fargo repeatedly stated – directly to the court and in discovery responses – that Freddie Mac did not have the document in hard-copy form. After both the special master and trial court ordered that the SA along with many other documents be produced, defendants failed to comply with those orders. Another significant document Freddie Mac was ordered to produce, the Tri-Party custodial agreement that typically contains an expansive waiver of jury trial, was never produced although Freddie Mac testified that it had possession of the document and was aware of the order. The Holms were forced to proceed to trial without the Tri-Party agreement.

Unless affirmed, the trial court's imposition of sanctions will inaugurate a new and dangerous model for undermining judicial authority and the orderly administration of civil justice in Missouri. Judge Elliott faced ten months of intensive discovery disputes and direct challenges to the court's authority before trial.

In the face of unprecedented contumacity, Judge Elliott displayed patience and encouraged defendants to conform their conduct to the Supreme Court Rules and orders of the court and special master. Transcripts of hearings on May 20, 2014, October 16, 2014, November 18, 2014, December 16, 2014, January 5, 2015, and January 12, 2015 unmistakably reveal defendants' chronic discovery deception and defiance to the trial court and special master. Finally, and only when his hand was forced, Judge Elliott overcame his extreme reluctance to impose harsh sanctions and struck defendants' pleadings.

The conclusion is inescapable: when litigants ignore discovery obligations and orders, disregard special master rulings, misrepresent facts in open court, suppress evidence, and through their conduct mock the civil rules that bind all litigants, a court must exercise the power to prevent system failure. No trial court would tolerate defiance of its orders or disregard of judicial authority, and such behavior should not be countenanced.

The factual narrative contained on pages 3-5 of the Substitute Brief for Appellants does not comport with the record. It is imperative to note that Appellants' characterization of a discovery disagreement *between the parties* was largely a disagreement between Wells Fargo on one side, and Holm and Freddie Mac together on the other side. Holm and Freddie Mac *agreed* that Wells Fargo signed written discovery answers containing false information, and that Wells Fargo and its counsel represented that a hard-copy of the SA did not exist, when in fact Freddie Mac testified that the hard copy of the SA did exist and Freddie Mac was never asked to produce it. Freddie Mac and Holm *agreed* that the 2008 SA was not available on the Freddie Mac website while Wells Fargo insisted that it was, at least until the deposition of Freddie Mac exposed the falsity of the assertion. Holm and Freddie Mac jointly preferred that the $10,306.94 reinstatement check be cashed and utilized to avoid the foreclosure and permit the Holm family to continue residing in their home. Wells Fargo, exclusively, preferred foreclosure.

In sum, Holm and Freddie Mac were allies on a substantial number of factual and discovery matters, as well as on the desire to proceed with reinstatement and avoid foreclosure. Wells Fargo took a different view. Wells Fargo's solitary position on a series of material issues explains, perhaps more than any other single fact, why the wrongful foreclosure occurred and why the lawsuit was litigated in a manner that produced severe sanctions. Wells Fargo alone made the decision to foreclose following its agreement to reinstate, and Wells Fargo alone made the litigation decisions to sign written discovery containing false information, misrepresent facts to the court and to the special master, fail to appear for a deposition, and refuse production of documents that the special master and the court ordered Wells Fargo to produce.

Wells Fargo orchestrated the mayhem described in more detail below.

STATEMENT OF FACTS

I. SPRING AND SUMMER OF 2008

In the spring of 2008, a severe storm raged through Holt, Missouri, [Tr. 387:8-12], tore up the Holm family house, blew out several windows, ripped up gutters, and damaged the metal trim on the barn and roof. [Tr. 387:13-24]. The damage to the roof of the home led to water leaks, causing further damage to the home's interior, including buckled floors. [Tr. 387:13-24].

Holm had property insurance. [Tr. 387:25-388:1]. American Security Insurance Co. sent Holm a check in the amount of $4,467.74 to cover the storm damage. [Tr. 389:1-19; Suppl. L.F. 315]. The check was made payable to Wells Fargo and David and Crystal Holm. [Tr. 389:22-24; Suppl. L.F. 315]. Holm sent the check to Wells Fargo to obtain its endorsement and permit deposit in Holms' account for the purpose of making the necessary repairs. [Tr. 390:2-6]. Wells Fargo refused to return the endorsed check. [Tr. 390:4-6]. Holm asked Wells Fargo to apply the check to his loan in lieu of returning it for deposit in their bank account. [Tr. 390:7-12]. Wells Fargo declined to apply the money to the Holm loan. [Tr. 390:13-17].

Holm communicated with Wells Fargo in May, June and July 2008 about the status of the insurance check and amounts owed on the note. [Tr. 390-91:1-11]. On June 4, 2008 Kozeny & McCubbin, acting as both legal counsel for Wells

Fargo, and Successor Trustee for the purpose of foreclosure, [Tr. 392:16-18], sent Holm a letter stating that the amount necessary to reinstate the loan was $6,608.93. [Tr. 392:6-25; Suppl. L.F. 111]. The letter stated that additional fees were owed. [Suppl. L.F. 111]. Holm questioned the validity of the reinstatement amount and additional fees. [Tr. 393:3-20]. Holm sent a letter to Kozeny disputing the validity of the debt. [Tr. 393:18-25 - 394:1-23; Suppl. L.F. 317-18]. The letter stated that Holm was waiting for Wells Fargo to apply the insurance check in the amount of $4,467.74. [Tr. 394:24-25 – 395:1-23; Suppl. L.F. 317-18].

Kozeny responded by letter on June 18, 2008 to Holm's letter disputing the validity of the debt. [Tr. 395:24-25 – 396:1-25; Suppl. L.F. 112]. The response did not resolve the validity of the debt, and so Holm wrote another letter to Wells Fargo. [Tr. 397:12-25; Suppl. L.F. 113]. Holm's June 24, 2008 letter stated that there were "checks that were agreed upon to use for the note to be brought current were mailed to us." [Tr. 397:25-398:1-3; Suppl. L.F. 113]. Holm was referring to the insurance checks that David and Crystal Holm endorsed and sent to Wells Fargo, but which were not returned to Holm by Wells Fargo. [Tr. 398:6-13]. Holm proposed sending Wells Fargo a check in the amount of $5200 to resolve the impasse. [Tr. 398:14-22].

Wells Fargo rejected Holm's proposal. [Tr. 399:2-3]. Kozeny responded with a letter dated June 26, 2008. [Tr. 399:4-11; Suppl. L.F. 119-125]. Kozeny attached documents to the June 26 letter. [Suppl. L.F. 119-125]. In reply to Holm's letter disputing the validity of the debt, Kozeny stated that "[t]hese documents verify the debt which is owed." [Tr. 400:9-12; Supp. L.F. 119-125]. Holm reviewed the note attached to Kozeny's letter. [Tr. 400:13-15; Suppl. L.F. 119-125]. The lender named on the note was Commercial Federal Mortgage Corp. [Tr. 400:16-21; Suppl. L.F. 120].

The note attached to Kozeny's June 26, 2008 letter was the only note sent to Holm by Kozeny or Wells Fargo in response to Holm's inquiry disputing the validity of the debt. [Tr. 401:9-18; Suppl. L.F. 119-125]. The note sent to Mr. Holm in June 2008 was not endorsed. [Tr. 401:19-21; Suppl. L.F. 119-125]. The note does not identify Wells Fargo or Freddie Mac. [Tr. 401:22-25; Suppl. L.F. 119-125].

II. THE FORECLOSURE SALE

Kozeny scheduled a foreclosure sale of the Holm property on August 15, 2008, at noon. [Tr. 402:2-11]. Holm was very upset and scared by the notice of sale, and began taking whatever steps were possible to avoid losing his home. [Tr. 402:12-17]. Holm called Kozeny and Wells Fargo approximately 5-6 times a day to discuss options. [Tr. 402:18-25 – 403:1-4]. On August 14, Holm talked to Wells Fargo several times in the morning and several times in the afternoon to avoid the sale. [Tr. 403:5-11]. At approximately 7 p.m. on August 14, while parked at a gas station on Kansas Avenue in Liberty, Missouri, Holm spoke to a Wells Fargo representative. [Tr. 403:12-21]. The representative gave Holm a reinstatement amount of $10,306.94, and told him that if he paid that amount the foreclosure sale would be postponed. [Tr. 403:22-25 – 404:1-24]. Holm agreed to pay the reinstatement amount, and was relieved. [Tr. 404:21-25 – 405:1-4]. The Wells Fargo representative instructed Holm to call Kozeny in the morning to arrange payment. [Tr. 404:8-13].

Holm called Kozeny at approximately 10 a.m. on the morning of August 15. [Tr. 406:9-18]. The Kozeny representative told him that the reinstatement amount of $10,306.94 was correct, and that Kozeny would call Holm later that afternoon with directions regarding where to send the reinstatement check. [Tr. 406:19-25 – 408:1-17]. Kozeny also told Holm that the foreclosure sale was postponed. [Tr. 407:3-5]. Holm agreed to the terms and conditions stated by Kozeny, and understood that the foreclosure sale was postponed. [Tr. 406:19-25 – 408:1-17].

After the 10 a.m. call with Kozeny, David went to his local physician for treatment of stress, anxiety attacks and panic attacks. [Tr. 405:11-20]. David's doctor told him to go to a local hospital for the purpose of obtaining a heart monitor. [Tr. 406:1-4]. David went to the hospital and had a heart monitor attached to his chest. [Tr. 406:5-8]. Between trips to the physician and hospital, David met with his mother, who withdrew $10,306.94 from her bank account in the form of a cashier's check. [Tr. 409:10-20; Suppl. L.F. 314]. With the cashier's check in hand, David waited for Kozeny to call him, as instructed. [Tr. 409:21-25].

Kozeny called Holm at approximately 1 or 2 p.m. on August 15. [Tr. 410:1-4]. Kozeny instructed David to overnight the cashier's check to its St.

Louis office, and to fax a copy of the check to Kozeny that afternoon. [Tr. 410:5-12]. David sent Kozeny a fax copy of the cashier's check at approximately 4:31 p.m. on August 14. [Tr. 411-12; Suppl. L.F. 140]. David sent the cashier's check to Kozeny by Federal Express overnight mail, as instructed. [Tr. 410:13-15; Suppl. L.F. 138-39]. A copy of the receipt for the overnight mail was retained. [Tr. 412:18-25 – 413:1-8; Suppl. L.F. 138-39].

As of Friday afternoon, August 15, 2008, David's understanding was that since he paid the reinstatement amount, the loan was reinstated and no foreclosure occurred. [Tr. 413:9-12; 414:20-23; 415:1-6]. On Monday, August 18, 2008, David called Wells Fargo to ask about future loan payments and "what we needed to do for payments." [Tr. 415:10-21]. Holm was told that Wells Fargo did not have that information at the time. [Tr. 415:22-24]. A few days later Holm received a letter from Kozeny returning the check in the amount of $10,306.94. [Tr. 415:25 – 416:1-23; Suppl. L.F. 114]. The letter stated that the check was being returned because the sale had already occurred. [Tr. 416:16-18; Suppl. L.F. 114-15]. Holm was never told that the cashier's check had to be received before the sale occurred. [Tr. 416:19-23]. Had he known that, "I'd got in the car and drove to St. Louis." [Tr. 417:4-5]. David also would have been willing to deliver the check to Kozeny's local office in Kansas. [Tr. 417:9-12].

Holm received another letter dated August 22, 2008 from Kozeny. [Tr. 417:21-25 – 418:l; Suppl. L.F. 116]. The August 22 letter stated that the funds are being returned because they weren't enough and/or weren't certified. [Tr. 418:13-

16; Suppl. L.F. 116]. The check was in fact a certified cashier's check and was in the amount both Wells Fargo and Kozeny told Holm to pay. [Tr. 418:17-24; Suppl. L.F. 116]. David was confused. [Tr. 418:25 – 419:1-3]. A few months later, after retaining counsel, Holm was offered another reinstatement. [Tr. 419:15-25 – 422:1-24]. Wells Fargo agreed to reinstate the loan again for payment in the amount of $8,162.24. [Tr. 422:1-7]. David obtained $8,162.24 from his mother and sent the money to Wells Fargo. [Tr. 422:17-24; Suppl. L.F. 118]. Wells Fargo did not reinstate the loan, and retained the check for approximately one year before returning it. [Tr. 422:25 – 423:1-13].

III. THE EARLY PART OF THE LITIGATION

Plaintiffs filed their Petition for Wrongful Foreclosure, Quiet Title, and Set Aside Trustee's Deed on November 26, 2008. [L.F. 16-38]. For three and one-half years no discovery or briefing was done on the case. [L.F. 2-4]. Defendants filed a Joint Motion for Summary Judgment on October 31, 2012. [L.F. 3]. Plaintiffs obtained new counsel for the purpose of appearing at a summary judgment hearing on April 16, 2013. [L.F. 4]. After a continuance, the Joint Motion for Summary Judgment was denied on August 21, 2013. [L.F. 5]. On October 11, 2013, plaintiffs served their first set of discovery requests to defendants and notices of depositions of defendants. [L.F. 5-6, 54-96, and 341]. Plaintiffs' initial written discovery sought basic information about the enforceability of plaintiffs' note under RSMo § 400.3-301, as well as "a copy of the applicable servicing agreement(s) in relation to plaintiffs' Deed of Trust dated July 30, 2001." [L.F. 511-536].

IV. THE DISCOVERY PERIOD

A. First Motion to Compel Discovery

Defendants filed two motions for extensions of time to respond to plaintiffs' first set of discovery requests, up to and including January 31, 2014. [L.F. 6]. On February 3, 2014, defendants served their answers and objections to plaintiffs' first set of discovery requests, and objected to nearly every discovery request. [L.F. 59-84]. Counsel for plaintiffs served a Golden Rule letter on February 6, 2014 and followed up with a telephone call requesting defendants to provide full and complete answers concerning their objections to 9 of the 10 interrogatories and 23 of the 25 requests for production of documents. [L.F. 55]. No concessions were made and plaintiffs filed their First Motion to Compel Discovery on March 27, 2014. [L.F. 54-96].

A hearing was held on May 20, 2014 on plaintiffs' Motion to Compel Discovery. [Tr. 7-13]. The court granted plaintiffs' Motion to Compel, ordered defendants to provide answers to all discovery, and stated that "we don't play hide the ball up here." [Tr. 11-13]. The court stated that answers should be provided within twenty days. [Tr. 13].

B. The Freddie Mac SA

Among the documents sought in the first set of written discovery, in Request No. 21, was "a copy of the applicable servicing agreement(s) in relation to plaintiffs' Deed of Trust dated July 30, 2001." [L.F. 70 and 83].

The SA is a contract between Freddie Mac and Wells Fargo. [Tr. 260:25 – 261:1-7; 268:13-15]. For notes owned by Freddie Mac, the servicer must follow the rules and policies set forth in the agreement. [Tr. 268:13-25 - 269:1-7]. One of the purposes of the SA is to make sure that when a servicer is servicing a Freddie Mac loan, "they do it correct." [Tr. 269:20-21]. For example, the SA instructs servicers on how to verify the validity of the chain of endorsements on a note. [Tr. 302:19-25 – 303:1]. The SA also identifies the documents the servicer must send to the foreclosing trustee [Tr. 288:5-10], instructs servicers to promote reinstatement of loans for borrowers, including by going the extra mile to reinstate a loan [Tr. 289:6-15], and describes allowable charges by servicers. [Tr. 360].

C. Defendants' Response to the May 20, 2014 Discovery Order

On June 23, 2014 (over one month after the court ordered that the discovery answers and production of documents be served), the undersigned received Freddie Mac and Wells Fargo's supplemental answers and responses to plaintiffs' first set of discovery. [L.F. 537-552].

Wells Fargo's response to the court's order to produce "a copy of the applicable servicing agreement" was to renew its objections to the production and add the following: "Subject thereto and without waiving same, the requested information is equally accessible to both Plaintiff and Defendants on the Federal

Home Loan Mortgage website." [L.F. 542 and 550]. Defendants did not produce a hard-copy of the SA. [L.F. 537-552]. On June 23, 2014, plaintiffs sent another Golden Rule letter requesting that the response to Request No. 21 be reconsidered. [L.F. 553-54].

Subsequently, defendants provided plaintiffs with a faulty website address and told plaintiffs they could obtain the requested documents at that address. [L.F. 101; 542; 550; 555-57; 558-59]. Plaintiffs were unable to obtain the SA from the Freddie Mac website provided. [Tr. 14-15; L.F. 101-02; 558-59]. Plaintiffs repeatedly requested defendants to simply send a hard copy of the SA but defendants did not produce the SA. [Tr. 14-15; 102:4-104:1; L.F. 101-02].

On September 4, 2014, plaintiffs' counsel sent a Second Golden Rule letter to defendants' lead trial counsel, Ms. Janet McKillip, requesting a correct link to the document. [L.F. 553-54]. Subsequently, the undersigned sent a Third Golden Rule letter on September 17, 2014 requesting documents the court ordered produced on May 20, 2014, including another request for the applicable SA. [Suppl. L.F. 610-11]. Ms. McKillip responded by directing plaintiffs' counsel to click on a website link to Freddie Mac and look for a servicing agreement. [L.F. 560-566]. On September 26, 2014, Ms. McKillip, sent an email stating that her client "does not keep hard copy documents of the servicing agreement." [L.F. 567]. Defendants refused to produce the court-ordered SA from the website because "it would require that we print off, and produce 5735" pages. [Tr. 18:5-9; L.F. 102; 106-07].

Plaintiffs filed their Motion for Rule 61.01(b) Sanctions on October 3, 2014. [L.F. 100-121]. *Defendants never filed a written response to plaintiffs' Motion for Rule 61.01(b) Sanctions*. [Tr. 101:22-25–102:1]. The court heard arguments on October 21, 2014. [Tr. 14-30]. The motion was continued to permit the parties to explore resolution, including by agreeing that Ms. McKillip would email plaintiffs' counsel a list of all the topics that were in the relevant body of material on Freddie's website, and plaintiffs' counsel would then designate selected portions for hard-copy production. [Tr. 22:21-25–23:1-18].

D. Second Motion to Compel Discovery

On May 21, 2014, plaintiffs served their second request for production of documents to Wells Fargo. [L.F. 122-130; 131-34]. The second request made seven requests for additional documents providing documentation to verify the amount of debt allegedly owed by plaintiffs, such as receipts for all fees charged to borrower that were added to the loan's principal balance. [L.F. 131-34].

Wells Fargo was deposed pursuant to Rule 57.03(b)(4) on September 16, 2014. [Tr. 338-79; L.F. 155-58]. Amber Ott testified on behalf of Wells Fargo that Wells Fargo had received invoices, including copies of checks regarding foreclosure charges, such as the recording of a trustee's deed, and believed that those invoices were not produced to plaintiffs. [Suppl. L.F. 407 and 461]. On September 17, 2014, the undersigned sent defendants' counsel, Ms. McKillip, a Golden Rule letter seeking production of documents identified by Ms. Ott. [L.F. 148-150]. Ms. McKillip replied that she would provide a formal response to the

Golden Rule letter the next day. [L.F. 151]. However, Wells Fargo did not provide documents responsive to the requests, and plaintiffs were forced to file a Second Motion to Compel Discovery. [L.F. 122-158].

The parties argued the Second Motion to Compel on October 21, 2014, along with plaintiffs' Motion for Rule 61.01 Sanctions. [Tr. 14-30]. Regarding Ms. Ott's testimony concerning documents responsive to Request Nos. 6 and 7, Wells Fargo agreed to supplement its answers. [Tr. 23-24].

E. The Deposition of Kozeny & McCubbin

After Wells Fargo's testimony on September 17, 2014 concerning documents reflecting charges as successor trustee, and checks, invoices, statements, and receipts sent by Kozeny & McCubbin to Wells Fargo, plaintiffs issued a subpoena on October 14, 2014 to Kozeny & McCubbin for production of documents. [L.F. 197-211]. Kozeny & McCubbin was served on October 30, 2014. [L.F. 198]. Kozeny's lawyer wrote plaintiffs' counsel a seven-page letter objecting to the subpoena. [Suppl. L.F. 751-757]. Plaintiffs' counsel contacted Kozeny's counsel, Mr. Andrew Jones, with a proposal to resolve the dispute, and Mr. Jones replied by saying the compromise proposal was reasonable (proposal to limit the topics of the subpoena and for Mr. Jones to produce a witness to lay a foundation for attorney-client privilege), and he would check with his superior and respond no later than the following day. [Tr. 66:1-13]. Thereafter, Mr. Jones never returned calls or responded to emails and letters to resolve the dispute. [Tr. 66:13-16; Suppl. L.F. 758-59]. At the pretrial on December 16, 2014, Mr.

Blanchard, another Kozeny lawyer representing defendants, told plaintiffs' counsel informally that he agreed that if a party wears two hats (as successor trustee and attorney), then, as a trustee, discovery should not be withheld on the basis of attorney-client privilege. [Tr. 57; 59:25; 69]. A stipulation on record was made that Kozeny's documents as successor trustee responsive to the subpoena are discoverable. [Tr. 69:15-19].

A second subpoena was issued on November 24, 2014 to Kozeny & McCubbin for its deposition for December 29, 2014. [Suppl. L.F. 1-7]. No motion for protective order, motion to quash subpoena, or objections to the deposition of Kozeny & McCubbin was filed. [L.F. 1-15]. At the pretrial on December 16, 2014, Mr. Blanchard informed plaintiffs' counsel and the court that Kozeny would appear at the deposition scheduled for December 29, 2014 and that it was a "nonissue." [Tr. 68:9-12]. The special master heard arguments of counsel for Kozeny & McCubbin and plaintiffs, and subsequently ruled that plaintiffs properly served a subpoena compelling testimony by a corporate representative of Kozeny & McCubbin requiring the witness's appearance at the offices of plaintiffs' counsel on December 29, 2014. [Tr. 139:15-23; Suppl. L.F. 671]. Kozeny & McCubbin did not appear at the ordered December 29, 2014 deposition. [Suppl. L.F. 671-672].

F. <u>The Deposition of Freddie Mac</u>

After plaintiffs served their third amended deposition notice for Freddie Mac's deposition on November 3, 2014, Freddie Mac filed its Motion to Quash and Motion for Protective Order on November 13, 2014. [L.F. 159-170; 171-177]. A hearing was held on November 18, 2014 on Freddie Mac's Motion to Quash and Motion for Protective Order. [Tr. 31-38]. The court overruled Freddie Mac's Motions. [Tr. 36:11-12]. That same day, plaintiffs served their Fourth Amended Notice of Deposition of Freddie Mac for December 2, 2014. [Tr. 41:9-11; 44:12-14]. Freddie Mac did not appear at the December 2, 2014 deposition, nor did it seek a protective order. [Tr. 44].

At the pretrial conference on December 16, 2014, the court ordered Freddie Mac to appear for a deposition at 11:00 a.m. on Friday, December 19, 2014. [Tr. 91-92]. The court further ordered Freddie Mac to pay for the court reporter's time for the no-show deposition on the December 2, 2014 deposition. [Tr. 93-94]. On December 19, 2014, Dean Meyer appeared as the corporate representative of Freddie Mac in response to plaintiffs' Fifth Amended Notice of Deposition of Freddie Mac. [Suppl. L.F. 319; 326].

Meyer's testimony sharply contradicted defense counsel's prior statements about the location and existence of the SA. [L.F. 239-241; 274-286]. Meyer testified that (i) the requested SA was not available on the Freddie Mac website (counsel told the court the opposite on October 21, 2014) [Suppl. L.F. 319; 340], (ii) a copy of the requested SA was available at his office [Suppl. L.F. 319; 340], (iii) he had never been asked to produce a copy [Tr. 285:2-25 – 286:1-11], and (iv) several of Freddie Mac's prior answers to written discovery were false. [Tr. 278:15-25 – 280:1-21]. Defendants never filed any response to plaintiffs' Motion for Rule 61.01 Sanctions or Reply in Support of sanctions, or made any objections to sanctions based on lack of notice or the absence of prejudice at the hearing. [Tr. 101:22-25 – 102:1].

When the trial court first reviewed Meyer's sworn testimony contradicting Ms. McKillip – which occurred after the court had addressed the non-production of the SA for months and had listened to Ms. McKillip's statements that no hard copy existed and that it was available online – the court had what it described as a "Wow" moment:

> Well, I'm not going to lie to you. I was surprised when I got to see the excerpts that were outlined in the motion for sanctions from Mr. Meyers (sic). Wow. That was – kind of shook me to the shoes there that if somebody had simply asked this guy, he could have produced those documents months ago and we wouldn't have been up here arguing this . . .

[Tr. 129:9-15].

V. THE APPOINTMENT OF SPECIAL MASTER HONORABLE ABE SHAFER

At the first pretrial conference on December 16, 2014, the parties agreed that a special master should be appointed. [Tr. 55, 84, 94-95]. The court agreed to appoint a special master, and further ordered that all fees and costs associated with the retaining of a special master will be paid by defendants. [Tr. 94-95]. Retired

Platte County Judge Abe Shafer was appointed special master on December 23, 2014. [L.F. 295].

On December 27, 2014, less than three weeks before trial, the special master served a Notice of First Meeting of Parties or Their Attorneys. [Suppl. L.F. 13]. The Notice set the first meeting for December 29, 2014. [Suppl. L.F. 13]. On December 29, 2014, counsel for the parties met with the special master for a thorough vetting of all pending discovery disputes. [Suppl. L.F. 729-733]. Following the lengthy first meeting with the special master, the special master's Findings of Fact and Rulings Dated December 29, 2014 were filed. [L.F. 296-301].

The special master reviewed defendants' discovery answers, discovery motions and responses, and the depositions of Freddie Mac and Wells Fargo. [L.F. 296 at ¶ 4]. The special master ordered defendants to "produce all documents identified on Exhibit A (Pending Discovery Disputes) and all written responses to the pending discovery no later than noon on Friday, January 2, 2015." [L.F. 297 at ¶ 5]. Exhibit A to the special master's Findings included unanswered discovery requests from the first set of discovery that was the subject of plaintiffs' first motion to compel and the trial court's order for defendants to answer discovery on May 20, 2014, as well as more recent discovery requests that had gone unanswered. [L.F. 299-301].

The special master overruled defendants' objections to the fourth set of written discovery, and ordered that the depositions of Wells Fargo and Freddie

Mac be completed on January 6, 2015. [L.F. 297 at ¶¶ 6, 7 and 9]. Ms. McKillip expressly agreed to the date of January 6, 2015 for the deposition of Wells Fargo. [Suppl. L.F. 768-69]. Finally, the special master recommended to the trial court that the costs of the January 6 depositions be taxed against the defendants. [L.F. 297-98 at ¶ 10].

As of the noon deadline on January 2nd to comply with the order to produce documents, defendants had failed to produce a single, solitary document. [Tr. 110-121]. Among the documents listed on Exhibit A and not produced was the Tri-Party agreement between Commercial Federal (original lender of Holm's loan) and Freddie Mac. [L.F. 299-301]. The Tri-Party Agreement is an agreement between Freddie Mac, the servicer and the document custodian regarding custody of relevant documents. [Suppl. L.F. 319; 359]. The Tri-Party Agreement describes the processes that must be followed for the transfer of notes. [Suppl. L.F. 319; 359].

According to Meyer, the Tri-Party Agreement relating to the Holm note existed. [Suppl. L.F. 319; 359]. Meyer stated that the Tri-Party Agreement was in Freddie Mac's files and he could produce it. [Suppl. L.F. 319; 359]. Meyer confirmed at a deposition the following month that the Tri-Party Agreement was in Freddie Mac's files, but had not been produced. [Suppl. L.F. 504; 513].

Plaintiffs attached an example of a Tri-Party Agreement commonly used in the servicing industry to their brief in Opposition to Defendants' Motion for Judgment or, In the Alternative, For a New Trial. [Suppl. L.F. 612-738, at 736-

38]. Tri-Party Agreements commonly used in the servicing industry contain broadly worded jury waivers. [Suppl. L.F. 737]. Plaintiffs specifically requested that defendants produce the Tri-Party Agreement identified by Meyer, but it was never produced. [L.F. 296-301; Suppl. L.F. 319; 359; 513].

VI. SANCTIONS

A. The May 20, 2014 Hearing and Order

On May 20, 2014, the trial court granted plaintiffs' motion to compel discovery and ordered defendants to produce discoverable information no later than 20 days from the date of the hearing. [Tr. 11-13]. The court informed defendants to "Answer discovery. . . But we don't play hide the ball up here. Just answer discovery." [Tr. 12:4-7].

Defendants did not comply fully with the court's order, including by failing to produce a copy of the requested Freddie Mac SA. [Tr. 14:21-22].

B. The October 21, 2014 Hearing

A hearing on plaintiffs' Motion for Rule 61.01 Sanctions was held on October 21, 2014. [Tr. 14-30]. The Motion for Rule 61.01 Sanctions was based in part on defendants' non-compliance with the court's May 20 order to produce the SA, [Tr. 14:21-22], and asked the court to strike defendants' pleadings. [L.F. 100-121]. The court heard argument, and instructed the defendants as follows: "Here's the deal: I ordered you to produce the document. Produce the document . . . Did you not understand what I said?" [Tr. 15:24-25 – 16:1-2]. The trial court informed defendants' counsel: "[L]et me caution you, Counsel. If I find out you're - - your - - your – the deponent is not answering questions that they should be, the sanctions will be heavy in view of the fact that we are so close to trial . . . . I'm not into this hide-the-ball stuff." [Tr. 27:19-25 – 28:1-10].

It was at the October 21, 2014 hearing that Ms. McKillip stated that the applicable SA is available on a public website and "we would need to go to the public website". [Tr. 15:18-25 – 16:1-2]. Freddie Mac, however, later testified that the applicable SA was not available on Freddie Mac's website. [Suppl. L.F. 319; 340]. Further, Mr. Meyer, stated that he drafted the SA and is familiar with its contents, whereabouts and history, yet *no one ever asked him for a copy*. [Tr. 256; 281:1-5; 285:16-25 – 286:1-11; Suppl. L.F. 319 and 340]. Ms. McKillip admitted at the January 5, 2015 hearing that there were obviously "discrepancies" between what Mr. Meyer had stated and what she had previously told the court. [Tr. 106:11-14].

C. The November 18, 2014 Hearing

At the November hearing to consider, among other things, defendants' Motion to Quash and Motion for Protective Order regarding the deposition of Freddie Mac scheduled on November 13, 2014 [L.F. 159-196], the trial court told defendants to quit throwing up discovery "roadblocks." [Tr. 35:12-25- 36:1-9]. Judge Elliott also issued another warning to defendants: if they didn't stop obstructing discovery, "sanctions could be entered at some point here . . ." [Tr. 36:3]. The sanctions could even include "striking pleadings." [Tr. 36:8; 38:13-21].

D. The December 16, 2014 Pretrial Hearing

Kozeny attorney Martin Blanchard appeared in court for the first time on this matter on December 16, 2014. [Tr. 40:23-24] Mr. Blanchard described himself as a "partner" at the Kozeny law firm. [Tr. 40:25-41:1].

Judge Elliott informed defendants' counsel that defendants failed to comply with discovery requests and orders. [Tr. 52:8-16]. Again the trial court cautioned defendants that sanctions could be entered, including "striking pleadings." [Tr. 52:8-16].

During the exchange with the court, Mr. Blanchard said, "if we haven't produced them and my client is still looking for them, then they don't exist." [Tr. 74:17-19]. The trial court and Mr. Blanchard discussed whether the requested documents exist. [Tr. 74:16-79:1-13]. The court explained that, although it was Mr. Blanchard's first appearance in court on this case, "if you've read the transcripts, I would have thought that you could have seen that the court was crystal clear you need to provide these documents or make it clear they don't exist, or something." [Tr. 77:1-5].

Mr. Blanchard replied: "Well, would the Court have me attempt to produce documents from my client that do not exist?" [Tr. 78:8-10]. Again Mr. Blanchard asserted: "I represent to the Court that if the documents are not here, have not been produced, then they don't exist." [Tr. 78:20-22].

Ms. McKillip interjected that the documents responsive to the second Request No. 6 do exist, although they were not produced. [Tr. 81:22-25]. The trial court pointed out the contradiction to Mr. Blanchard. [Tr. 82:10-13]. Finally, the undersigned then read from the deposition of Wells Fargo's corporate designee stating unequivocally that the documents Mr. Blanchard claimed did not exist, *actually do exist*. [Tr. 84:17-25–85:1-10]. The trial court described Mr. Blanchard's statement as an intentional misrepresentation [Tr. 86:13-14], and ordered all counsel into chambers. [Tr. 90:1-9]. Instead of ordering sanctions, the court stated to Mr. Blanchard that "I don't think that's proper on your part to do that." [Tr. 86:8-9].

E. The January 5, 2015 Hearing

On January 5, 2015, plaintiffs made a very detailed record of all of the discovery abuse committed by defendants during the previous seven months, defendants' attempts to sabotage plaintiffs' ability to prepare and present facts framed by the pleadings, and requested that sanctions – at long last – be imposed. [Tr. 101-105; 110-123]. Counsel for plaintiffs then detailed the particular discovery requests and deposition conduct that reflected obstruction, non-compliance with discovery obligations and court orders, and prejudice to plaintiffs. [Tr. 101-105; 110-123].

When Ms. McKillip replied that she had informed her clients about the court's discovery orders, the court said: "Did you tell them that way back in October when I made those comments?" [Tr. 124:25 – 125:1]. Ms. McKillip conceded that she had failed to disclose the court's discovery orders to Freddie Mac, but instead was only "in contact with Wells Fargo, as the servicer for Freddie

Mac." [Tr. 125:5-6]. The court then described its extreme reluctance to impose serious sanctions on a party, something the court had never done in 14 years on the bench. [Tr. 126:5-19].

Judge Elliott did not consider the imposition of harsh sanctions to be a high point in his judicial career, but felt that defendants had "backed me into a corner, out of which I cannot escape, and I think you also backed the plaintiffs into that corner." [Tr. 127:6-8]. The trial court then struck defendants' pleadings. [Tr. 126:21-25 – 127:1-13].

The court ordered plaintiffs to submit a proposed Pretrial Order based upon the ruling made on January 5, 2015. [Tr. 144:15-17]. Plaintiffs filed their proposed Pretrial Order on January 8, 2015. [Suppl. L.F. 30-52]. Plaintiffs also filed their Suggestions Regarding Scope of Sanctions on January 12, 2015. [L.F. 372-76].

F. The January 12, 2015 Hearing

On January 12, 2015 (two days before trial), the court made a detailed record concerning defendants' discovery abuse and repeated misleading facts to the court and plaintiffs. [Tr. 151:2-25 – 155:1-5]. The trial court sanctioned defendants for many reasons: they failed to respond to discovery requests, failed to comply with court orders to respond to discovery requests; misled the court and plaintiffs regarding the availability of requested documents; misled the court in open court by saying that certain documents did not exist when, in fact, those documents did exist; failed to contact the appropriate persons at Freddie Mac to provide requested discovery; failed to comply with the special master's ruling to produce discovery; continued to assert previously overruled objections; failed to produce witnesses for depositions after being ordered to do so by the court; and failed to have a witness appear for a deposition after the special master ordered the deposition to proceed in the Kansas City area. [Tr. 152-53].

The trial court found that defendants' discovery abuses imposed an unfair burden on plaintiffs and reflected a contumacious and deliberate disregard for the authority of the court and special master. [Tr. 153:25 – 154:1-3]. The trial court further found that defendants made a calculated and deliberate effort to impede plaintiffs' ability to prepare and present their case, particularly their case relating to punitive damages. [Tr. 154–155:1-5].

G. Misrepresentations to the Court

Preceding sections detail the misrepresentations that led to the following exchange between the trial court and Ms. McKillip:

THE COURT: Did you not stand there several times and tell me that this information, the servicing agreement, was available on the website?

MS. MCKILLIP: That is correct, Your Honor. That is based upon the information provided by Wells Fargo, one of my clients.

[Tr. 105:18-23].

* * * * *

MS. MCKILLIP: With regard to the information provided, that was pursuant to the power of attorney and the servicing agreement between Freddie

Mac and Wells Fargo. When the testimony of Mr. Meyer was elicited at deposition, there were obviously discrepancies between what he had stated and what had been previously provided.

[Tr. 106:9-14].

Among other things, Ms. McKillip's statements above demonstrate that Wells Fargo was directing the litigation on behalf of defendants, and Ms. McKillip's tactical choices were at the instruction of Wells Fargo.

VII. THE TRIAL EVIDENCE

In addition to the testimony of David Holm summarized above, plaintiffs' trial evidence included testimony from Freddie Mac, Wells Fargo, Crystal Holm, and Dr. Kurt Krueger, an expert witness.

A. Testimony of Freddie Mac

During trial, plaintiffs read the Rule 57.03(b)(4) deposition of Meyer [Tr. 252-305; 309-337; 500-09]. Meyer testified about Freddie Mac's guidelines regarding reinstatement, servicer conduct, loss mitigation philosophy, approved fees and charges, and foreclosure procedures, among other topics in the partial SA produced. [Tr. 252-305; 309-337; 500-509]. Because the complete SA in effect in 2008 was never produced, a partial SA was received in evidence as Trial Exhibits 27, 28 and 49. [Suppl. L.F. 126-28, 129-37, 154-313 respectively]. The court's Judgment made explicit reference to the SA, and to how Freddie Mac's SA applies to the Holm loan. [L.F. 454-55].

Meyer stated that "a key charter" of Freddie Mac's mission is to aid a homeowner's pursuit of a home. [Tr. 255:10-19]. Meyer agreed that Freddie Mac has an interest in helping Holm stay in their home, and that Freddie Mac created policies and regulations to facilitate keeping homeowners in their home during times of financial distress. [Tr. 255:23-25; 256:1-12]. Meyer admitted he had a significant role in drafting these regulations [Tr. 256:13-21], and that both Wells Fargo and Kozeny were "bound by Freddie's rules and regulations." [Tr. 260:25-261:1-7].

1. Production of An Incomplete SA

Meyer conceded the SA could be produced, both in hard copy and electronically. [Tr. 286:4-7]. At his January 6th deposition, Meyer admitted they produced only *sections* of the SA after being directed to produce the SA. [Tr. 501:9-25 - 503:1-8]. Meyer testified that Freddie Mac still had not produced the 2008 SA in full [Tr. 504:23-25 – 505:1], but only the sections Freddie Mac and its in-house counsel perceived to be relevant. [Tr. 502:11-16].

2. Agreement to Reinstate

Regarding Holm's discussion with Wells Fargo and Kozeny concerning reinstatement and halting the foreclosure sale in exchange for $10,306.94 [Tr. 261-262], Meyer agreed that this arrangement was desirable since the homeowner could reinstate. [Tr. 263:17-19]. Meyer stated that part of Freddie Mac's Mission is to aid homeowners by helping them find ways to keep their house. [Tr. 263:20-23]. When reviewing sections of the SA, Meyer agreed that the most desirable resolution to a delinquency was reinstatement [Tr. 317:15-23], and that reinstatement is beneficial to all parties. [Tr. 312:1-11].

Meyer agreed that a servicer *must* accept reinstatement when the proper funds are presented. [Tr. 325:10-12]. In addition, Meyer testified that verbal or written notifications of alternatives to foreclosure offers were acceptable under the reinstatement section of the SA. [Tr. 326:20-25 - 328:1-8]. Meyer conceded that unless the borrower submits a verbal or written rejection of an alternative to foreclosure offer, the servicer must postpone the referral to foreclosure. [Tr. 327:6-12]. When asked if the particular facts regarding David's communication with Kozeny to postpone the foreclosure sale and seek reinstatement fell under the language of the servicing agreement, Meyer said that they did. [Tr. 327:13-15]

3. Freddie Mac on Wells Fargo's Discovery Answers

Meyer agreed that several answers Wells Fargo gave in discovery were false. [Tr. 278:15-25 – 280:1-21]. For instance, Wells Fargo identified itself as an owner of the Holm's note and Meyer stated that was an incorrect statement because Wells Fargo never owned the Holm's note. [Tr. 280:10-25]. Further, Meyer testified that other errors were made regarding the parties that owned the note. [Tr. 281:6-10].

4. Ability to Enforce the Note

After inspecting a copy of the note marked as trial exhibit 26, Meyer observed there was no endorsement. [Tr. 302:13-22; Suppl. L.F. 119-125]. He explained that Freddie Mac requires the note to be endorsed in blank so that if Freddie Mac wished to enforce it, such an endorsement granted them this ability.

[Tr. 302:23-25 - 303:1-9]. Meyer also admitted that there was no mention of Freddie Mac or Wells Fargo on the note, as would be required by Freddie Mac, to enforce the note. [Tr. 304:3-25 - 305:1-6].

B. Testimony of Wells Fargo

Amber Ott, a loan verification analyst and eviction specialist, testified at trial pursuant to Rule 57.03(b)(4) deposition testimony on behalf of Wells Fargo. [Tr. 338-378]. Prior to the foreclosure, Ms. Ott said that American Security Insurance Company was chosen by Wells Fargo to be the property damage carrier to assist in the property damage of Mr. and Mrs. Holm's home. [Tr. 359:4-11]. Ott agreed that Mr. and Mrs. Holm asked that money from the insurance claim go to the payment of their loan, and a check totaling $4,467.74 was eventually issued to Wells Fargo from American Security Insurance Company. [Tr. 362:7-16]. Ott testified that the check was cashed by Wells Fargo *after* the foreclosure sale had taken place. [Tr. 362:17-25 - 363:1-6].

Ott discussed Holm's attempts to make payments to keep their home by consistently sending money to Kozeny in 2008. [Tr. 377:13-17]. Further, she stated that Holm communicated with Wells Fargo that he desired to make payment arrangements. [Tr. 367:18-23 - 368:1-2, 10-11], and that her experience at Wells Fargo teaches that homeowners who wish to make payment arrangements in the midst of foreclosure, like Holm, do so in order to halt the foreclosure sale. [Tr. 368:14-24].

Ott agreed that, after the communication between Holm and Kozeny regarding reinstatement, the check sent by Holm was a certified check. [Tr. 369:1-10]. Moreover, she said that amount was not in dispute by Wells Fargo. [Tr. 356:24-25 - 357:1-2]. Ott testified that if Kozeny received the certified check in the correct amount to reinstate before the sale, the sale would have been stopped. [Tr. 356:17-23]. When discussing the harshness of Well Fargo's reinstatement policy [Tr. 372-373], Ott admitted that she is "not here as a human being" but "as a representative of Wells Fargo." [Tr. 373:2-3].

VIII. POST JUDGMENT HEARING

On May 12, 2015, plaintiffs' counsel was sworn to testify about facts relating to the defendants' post-trial motion, [Tr. 609:16-24], including that statements made in defendants' pleadings concerning Amber Ott and her deposition were untrue. [Tr. 609:25-610:1-18]. For example, Leyh was never told by Ms. McKillip at any time that Ott was *subpoenaed* to testify in New York or ordered to appear. [Tr. 610:5-9]. Leyh testified he was merely told that Ott had a corporate designee deposition in New York. [Tr. 610:9-10]. In a meeting with the special master, Ms. McKillip agreed on a January 6th deposition date for Ott. [Tr. 610:10-13; Suppl. L.F. 768-769].

Regarding jury instructions, Leyh testified that he never received any filed or signed proposed jury instructions from defendants. [Tr. 610:19-22].

Finally, Leyh testified that two subpoenas were served on Kozeny & McCubbin. [Tr. 612:8-11]. On December 26th Leyh received an email from Ira Blank, explaining that he now represented Kozeny, and further, that instead of bringing the Kozeny witness to Mr. Leyh's office on December 29, that Leyh should travel to St. Louis to take the deposition. [Tr. 613:9-15]. Blank refused to talk to the special master at that time. [Tr. 613:15-16]. Leyh subsequently contacted the special master, and they proceeded to talk to Blank in three conversations on Friday, December 26 and Saturday, December 27. [Tr. 613:16-20]. Leyh said that Blank tried to convince the special master to allow the witness for Kozeny to appear in St. Louis. [Tr. 613:17-20]. At no time did Blank state that he rejected the special master's authority on this issue or objected that it was beyond the scope of the special master's authority. [Tr. 613:20-25]. Additionally, Leyh testified that no objections were filed by Blank or Kozeny to the notice, although some were faxed to his office on the 29th of December. [Tr. 614:1-4].

IX. THE COURT OF APPEALS OPINION

The Court of Appeals reversed the Judgment quieting title in favor of Holm on the grounds that Holm made an election to recover monetary damages and a party may not recover both damages and title to the property in equity. The Court of Appeals also reduced the amount of Holm's actual damage award by a total of $95,912.30 ($89,762.30 for the post-foreclosure loss in value of the property and $6,150 for the value of post-foreclosure repairs).

The Court of Appeals affirmed the sanctions, finding the trial court's grounds compelling and not an abuse of discretion. The Court of Appeals affirmed the Judgment in favor of Holm on the wrongful foreclosure claim because Holm consistently disputed that the loan was in default and because of substantial evidence proving that an enforceable reinstatement agreement was reached before the foreclosure sale.

The Court of Appeals also affirmed the Judgment on the punitive damage claim, and upheld the trial court's conclusion that the right to a jury trial was not abridged because the effect of the sanctions was to render the case uncontested and subject to judgment in a manner analogous to default judgment.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN SANCTIONING DEFENDANTS FOR UNPRECEDENTED DISCOVERY ABUSE IMPAIRING PLAINTIFFS' ABILITY TO OBTAIN EVIDENCE IN SUPPORT OF LIABILITY, COMPENSATORY AND PUNITIVE DAMAGES, AND TO PREPARE FOR TRIAL (APPELLANTS' POINT VII)

Standard of Review

The trial court has broad discretion in determining the admission of evidence and the imposition of discovery sanctions. Lewellen v. Franklin, 441 S.W.3d 136, 149 (Mo. 2014). The trial court's decision will not be disturbed unless there is an abuse of discretion. Id. (citing Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813, 819 (Mo. banc 2000)). An abuse of discretion occurs "when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Id. Even if error exists, the appellate court will not reverse a judgment unless the erroneous sanction resulted in prejudice. Id.

Analysis

A. The Purpose of Discovery is to Eliminate Concealment

The rules of civil discovery are designed to permit parties to obtain relevant information as quickly, efficiently and inexpensively as possible. Goede v. Aerojet Gen. Corp., 143 S.W.3d 14, 22 (Mo. Ct. App. E.D. 2004) (citing State ex rel. Castillo v. Clark, 881 S.W.2d 627, 630 (Mo. banc 1994)). Discovery is not intended to be a battleground for litigation warfare where the most combative or sneaky adversary wins. Id. The discovery rules are part of Missouri's rules of practice and procedure to promote the orderly administration of justice. Trotter v. Distler, 260 S.W.3d 913, 916 (Mo. Ct. App. E.D. 2008) (citing Sitelines, L.L.C. v. Penstar Corp., 213 S.W.3d 703, 707 (Mo. Ct. App. E.D. 2007)).

If the discovery rules are to be effective, courts must impose appropriate sanctions for discovery rule violations. M.H. Crompton v. Curtis-Toledo, Inc., 661 S.W.2d 645, 650 (Mo. Ct. App. 1983).

B. Rule 61.01

The selection of which sanctions are most appropriate "is a matter within the discretion of the court." Davis v. Chatter, 270 S.W.3d 471, 476 (Mo. Ct. App. 2008). Rule 61.01(d) permits the trial court to make an order that is "just." Delacroix v. Doncasters, Inc., 407 S.W.3d 13, 35 (Mo. Ct. App. W.D. 2013).

C. The Broad Scope of Discovery Abuse

The Statement of Facts reveals the wide range of intentional and obstructive actions by defendants. First, Exhibit A to the special master's rulings identifies 27 separate categories of documents that defendants were ordered to produce by noon, January 2, 2015. [L.F. 297]. Several of the requests for documents had been outstanding for more than one year (loan payment history, documents evidencing the sale of plaintiffs' note, and applicable SA) or were met with objections and non-production. Still other documents were identified by Freddie Mac's designated witness, Mr. Meyer, in his first deposition taken on December 19, 2014 (Tri-Party Agreement, invoices for reimbursement of fees from Wells Fargo to Freddie Mac, and a hard-copy of the SA), and were subject to an order shortening the time for a response.

Defendants failed to produce a single document identified on Exhibit A by the special master's January 2nd noon deadline. Some documents were emailed on January 5, ***but the bulk of the documents compelled by the special master rulings and court orders were never produced***. Holm was forced to go to trial without the Tri-Party Agreement, all communications between Holm and Wells Fargo in August 2008, copies of receipts and checks for all fees charged to Holm's loan by Wells Fargo, and any documents demonstrating that Freddie Mac bought Holm's note. [L.F. 299].

Second, Meyer directly debunked Ms. McKillip's statements to the court, and his testimony is binding on Freddie Mac. See State of Missouri ex rel. Plank, et al. v. Koehr, 831 S.W.2d 926, 929 (Mo. 1992) (one purpose of Rule 57.03(b)(4) deposition is to obtain statements that will be admissible and binding on corporate party). The revelation regarding Ms. McKillip's repeated claims that a hard-copy of the SA *does not exist* but the SA is available on Freddie Mac's website [Tr. 285:16-25 – 286:1-11], lead to the following exchange:

THE COURT: Did you not stand there several times and tell me that this information, the servicing agreement, was available on the website?

MS. MCKILLIP: That is correct, Your Honor. That is based upon the information provided by Wells Fargo, one of my clients.

[Tr. 105:18-23].

* * * * *

THE COURT: So the bottom line is, then, that it was your clients who was lying – to us?

MS. MCKILLIP: I'm saying that Wells Fargo provided what they were able to produce to the best of their knowledge –

THE COURT: No, no, no, no, no, no. I disagree, Counsel. Able to produce? Don't – don't start misleading me again today.

MS. MCKILLIP: I'm not attempting to mislead you, Your Honor.

THE COURT: You wouldn't like the results, okay? I'm not in the mood.

Here's the thing: They were able to produce these documents, obviously, had they simply made the request to the proper persons, right?

MS. MCKILLIP: If they had inquired to Mr. Meyer, yes, this –

[Tr. 107:5-21].

Although Appellants now claim that plaintiffs did not suffer prejudice from defendants' discovery misconduct, that claim is not preserved for appellate review. No objection to the imposition of sanctions was made to the trial court, nor was any such objection set forth in the motion for new trial, leaving nothing for the appellate court to address. [L.F. 458-478]. See Syn, Inc. v. Beebe, 200 S.W.3d 122, 135 (Mo. Ct. App. W.D. 2006).

In any case, Holm suffered substantial prejudice by being forced to go to trial without relevant documents, including the Tri-Party agreement and other documents identified on Exhibit A to the special master's Order. [L.F. 299-301]. For example, the special master not only compelled the production of the "applicable servicing agreement" but also communications between Wells Fargo an Holm, privilege logs for numerous documents withheld from production, and copies of checks issued by Wells Fargo for corporate advances and other expenses to third parties. [L.F. 299-301]. Wells Fargo's response was to ignore the special master's rulings, continue to assert privileges that had been overruled, continue to make objections that had been ruled untimely, and decline to produce documents. [Tr. 112:1-25-123:23].

The significance of corporate advances and alleged expense checks to third parties is that Wells Fargo added those costs to Holm's loan, contributing to Wells Fargo's assertion that Holm was in default, but refused to produce evidence that it actually paid the money or actually incurred the charge. The evidence described above might have been used to prepare witnesses for trial, address with Holm's expert witness during trial, or offer as exhibits in trial. Deprivation of these trial opportunities is prejudicial to Holm. Scheck Indus. Corp. v. Tarlton Corp., 435 S.W.3d 705, 720-1 (Mo. App. E.D. 2014).

Third, regarding second Request Nos. 6 and 7, defendants failed to produce any documents or other supplementation with fourteen days of the agreement presented to the trial court, and the trial court endured the following sarcasm from Mr. Blanchard: "Well, would the court have me attempt to produce documents from my client that do not exist?" [Tr. 78:8-10]. The trial court was displeased by what it described as an intentional misrepresentation by Mr. Blanchard, and ordered all counsel into chambers. [Tr. 85:21-25 – 90:1-9].

Fourth, Ms. McKillip's oral explanation for discovery delays and non-compliance illustrates Wells Fargo's contempt for a Missouri trial court. On December 29, 2014, she informed the special master and plaintiffs' counsel that *she had been unable to communicate with her Wells Fargo contact "for six weeks.*" [Tr. 611:9-11]. In other words, with the trial just a few weeks away, and after several months of intensive discovery, motion arguments, and rulings by the trial court, Ms. McKillip admitted just how disinterested Wells Fargo had been in this Clinton County, Missouri lawsuit. Wells Fargo was so unconcerned that it refused to reply or respond to its trial counsel's requests for information and for discovery in order to comply with judicial rulings. [Tr. 611:9-11]. It is difficult to image a more vivid example of Wells Fargo's purposeful disobedience to and disregard for the authority of the court, and for the administration of justice in

Missouri.

D. The Trial Court's Patience

The sanctions imposed by the court on January 12, 2015 were a long time coming. A fair-minded reader of the six hearing transcripts in this record would agree that sanctions resulted from many months of discovery abuse in which both Judge Elliott and retired Judge Shafer played significant hands-on roles. When a party continues to directly and flagrantly thumb it nose at the court's authority and the civil rules, what is a trial judge to do?

Appellants contend that they "made repeated, diligent, good-faith attempts to comply with burdensome discovery that far exceeded the scope of the pleadings and with discovery orders that set unrealistic, even impossible timeframes for compliance." Substitute Brief for Appellants, at 65. Conveniently, Appellants fail to supply detail about *why* timeframes were impossible to comply with, or what specifically was unrealistic about any discovery order. Appellants' self-servicing conclusions are designed to leave the wrong impression that Judge Elliott was unduly harsh and unfair.

The record suggests otherwise. The record contains no written opposition to plaintiffs' Motion for Sanctions because defendants never filed any opposition. Notwithstanding defendants' non-compliance with discovery orders in May of 2014, and misrepresentations to the trial court in October 21st and December 16th of 2014, and failure to appear for depositions in December 2014, *Judge Elliott still did not impose sanctions of any kind*. Instead, he appointed special master Shafer to organize the remaining discovery so that trial could proceed as scheduled. Special master Shafer then issued orders and made decisions about discovery disputes in late December 2014. Defendants' pattern of disregarding orders continued, and it is indisputable that they did not comply with special master Shafer's discovery rulings.

Judge Elliott displayed incredible – and admirable – forbearance. He explained his perspective as follows:

> I'm just going to be honest with you. I practiced law for, what, 18 years, something along those lines. I can't hardly remember now. I've been on the bench for 14 years, and never in all of that time have I ever seen problems with discovery and the roadblocks thrown up with discovery and the delays with discovery that I have witnessed in this case. I have never ever seen that before. And I've handled some fairly substantial matters, I guess, through the years. I have never, in my entire career, had to appoint a special master or be involved in a special master being appointed in a case because of discovery issues. This is new ground for me because you and your clients, whomever they may be, have just been totally unreasonable in – in this discovery process.
>
> . . . I probably should have put my foot down a long time ago, drastically, and – and imposed sanctions several weeks ago of a serious nature. But the truth is, I don't – I didn't want to have to do

> that. I did not want to reach this point. I do not consider this at all a high point in my career as a judge, to be faced with imposing sanctions on a defendant for discovery requests. I don't like the idea of having to do that, but I'm going to tell you this: I'm going to do it because I feel like I have to. I don't have any choice. You have backed me into a corner, out of which I cannot escape, and I think you also have backed the plaintiffs into that corner. You know, the – presenting them with all of this information, even on this late date (January 5, 2015), still with some objections that obviously don't have merit, I can't do anything else but impose the sanctions that have been requested. So I am going to strike the pleadings of the defendant.

[Tr. 126:5-127:13].

Appellants' effort to blame their discovery misconduct on Judge Elliott is an affront. Blaming their misconduct on the overbreadth of discovery, or on some unspecified and unrealistic timeframes, is deflection. Appellants are still hopelessly in denial about the depth and severity of their discovery misconduct.

E. The Trial Court Did Not Abuse Its Discretion When Imposing Sanctions

Appellants tout their virtuous conduct below as "repeated, good faith attempts to comply with" discovery. But that is not what the record shows. Appellants proceed by sidestepping the factual record revealing, for example, that defendants failed to even ask Freddie Mac for its discovery. The record reveals factual misrepresentations to the court, not reasonable efforts to meet parties' discovery obligations. The record is replete with examples of the chronic and intentional refusal to produce discoverable facts, witnesses for properly-noticed depositions, and a troubling failure to make truthful statements to a Missouri judge doing his best to fairly resolve litigation disputes. The overwhelming factual evidence set forth above drives the conclusion that the trial court not only exercised sound discretion, but was left with no alternative.

The court's sanctions ruling is not "clearly against the logic of the circumstances then before the court and . . . so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Lewellen, 441 S.W.3d at 149. The contrary is true. If severe sanctions were not imposed in this case, then Rule 61.01 would be effectively abandoned and parties left at sea in the face of combative and dishonest adversaries. See, e.g., In Re Marriage of Lindeman, 140 S.W.3d 266, 271-2 (Mo. Ct. App. 2004) (affirming trial court decision to strike pleadings and prohibit production of evidence by party who failed to comply with court orders to produce discovery); Lewellen, 441 S.W.3d at 149-50 (sanction of striking pleadings and preclusion of defense upheld where party failed to appear for depositions twice).

A party that provides false answers in discovery engages in reprehensible conduct. Goede, 143 S.W.3d at 20. Here, defendants gave false answers to the whereabouts of the 2008 SA, made false statements to the trial court about the

2008 SA, and – according to Meyer – signed discovery answers on behalf of Freddie Mac that contained false answers. Defendants' conduct in this case displayed a manifest contempt for judicial authority and Supreme Court Rules, is reprehensible, and demands severe censure.

F. Appellants' Analysis of Sanctions Is Disingenuous

Tellingly buried in the Appellants' brief is a discussion of sanctions that ignores the record. Appellants still do not acknowledge the profound contempt displayed by defendants for the trial court, special master, plaintiffs and the orderly administration of justice in Missouri.

1. The SA

Appellants' retelling of events relating to the 2008 SA is a double-down in denial. Appellants assert that the court's sanctions "focused almost exclusively on the Freddie Mac servicing agreement." Substitute Brief for Appellants, at 68. Appellants then devote the next four pages to refuting that straw man argument.

The court's sanctions decision was considerably broader than Appellants admit. See Tr. 111-123 (itemizing defendants' sanctionable conduct). Instead of focusing on the single issue of the SA as opposed to all of the other discovery requests ignored by defendants, the trial court explained, in part, as follows:

> And let me state for the record that I am imposing these sanctions because, as I've mentioned in prior appearances, it is the Court's opinion that the defendant has failed to respond to discovery requests – in accordance with the rules of discovery, they have

repeatedly failed to respond to those requests even after ordered to do so.

I believe they repeatedly misled the Court and the plaintiff as to the availability of certain requested documents, indicated that those documents were available on the Internet, causing Plaintiffs' counsel considerable time and effort in searching for the documentation that was not, in fact, available on the Internet.

Counsel for the defense misled this court about the existence of certain requested documents, indicated in open court that circuit – certain documents did not exist when, in fact, they did, which was verified by their own witness at a later date.

Counsel for the defense made no effort to contact the appropriate employees from the Defendant Freddie Mac who could readily provide the documentation requested and the documentation had been ordered by the Court. Defendants provided only documents deemed appropriate rather than all of the documents ordered by the Court and/or special master.

The Court further finds that the defendants failed to provide certain documents and information ordered by the Court and/or special master even after the special master found Defendants had failed to file timely objections to the requests, and that was according to irrefutable statements by Plaintiffs' counsel at a recent hearing.

Defendants continued to assert previously overruled objections, such as attorney-client privilege, when refusing to properly respond to discovery or provide discovery as ordered by the Court and/or special master. The defendants greatly exacerbated their noncompliance with discovery requests by what can only be described as obstinance in providing – or, failing to produce witnesses for depositions after specifically ordered by this court to have a crucial witness appear for a deposition. The defendants waited until the date set for a deposition to advise plaintiffs' counsel the witness would be available by telephone only. In addition, even after being specifically ordered by the special master to have another critical witness appear on a specific date and time, the witness failed to appear as ordered.

* * * *

By these actions, and those previously mentioned by the Court, and the allegations set forth in the plaintiffs' suggestions regarding the scope of sanctions which are hereby incorporated by reference in the Court's findings, the defendants have shown a contumacious and deliberate disregard for the authority of this court, both directly and through the special master. Defendants have thrown up roadblocks to the preparation of Plaintiffs' case at every stage of the discovery process by the perpetual evasiveness under – or, recalcitrance in

> complying with the discovery orders. I can only conclude that the defendants have engaged in a deliberate and calculated effort to prevent plaintiff from preparing their case and, thus, their right to their day in court.
>
> Many of the discovery violations by Defendants relate directly to Plaintiffs' ability to present evidence of their action under punitive damages and have resulted in a substantial prejudice and additional expense and hardship to the plaintiffs. The defendants' actions have made it virtually impossible for the plaintiffs to anticipate or prepare for any defense to this action; and to allow the defense to present evidence in any form, either through direct or cross-examination of witnesses, would violate the very foundational principles of fundamental fairness in our judicial system.
>
> The defendants have, by their actions, attempted to make a mockery of this judicial system, and it's time to pay the piper. It's, therefore, ordered that in addition to having their pleadings stricken, the defendants are prohibited from questioning, either direct or cross-examination, any witness in this case either as they may relate to the issue of liability, actual, or punitive damages.

[Tr. 151:7-153:4, 21-25; 154:1-155:5].

So much for the folly that sanctions in this matter "focused almost exclusively on the Freddie Mac servicing agreement." An order striking pleadings is warranted where the record demonstrates "a pattern of repeated disregard of the obligation to comply with discovery." Scott v. LeClercq, 136 S.W.3d 183, 190 (Mo. Ct. App. 2004) (citing Dobbs v. Dobbs Tire & Auto Ctrs., Inc., 969 S.W.2d 894, 899 (Mo. App. 1998)). The trial court's detailed explanation quoted above clearly shows a pattern or repeated disregard of the duty to comply with discovery, justifying the sanctions imposed.

Appellants claim that, despite the trial court's clarity regarding their failure to produce the applicable SA "in effect in August 2008," they were apparently unaware that it was the *2008 SA* that was requested. Substitute Brief for Appellants, at 69. Appellants' statements are misleading. At an October 21, 2014 hearing to discuss plaintiffs' Motion for Sanctions, the Court asked the lawyers to take a break to privately discuss a resolution to defendants' failure to produce the 2008 SA. Following the private discussion, a further record was made and plaintiffs' counsel described his willingness to "streamline my selection" of documents. [Tr. 23:9]. The prior discussion focused on the 2008 SA, and counsel for defendants was well aware of that focus. Later, during a discovery conference with special master, the parties again discussed defendants' failure to produce the 2008 SA. Exhibit A attached to the special master's Findings of Fact refer to the "applicable servicing agreement," which everybody involved understood to mean the 2008 SA.

Appellants also refer to the production of screenshots in an effort to show defense counsel's good faith. Substitute Brief for Appellants' Brief, at 70. What

Appellants omit, however, is that at the time the screenshots were discussed in the fall of 2014, plaintiffs were proceeding on the false assumption that the hard-copy of the 2008 SA *did not exist*. That assumption was based on Ms. McKillip's repeated representations. When the truth about the existence of the 2008 SA emerged, the screenshot discussions could be seen as a waste of time and an unnecessary, expensive diversion.

Despite Appellants statements to the contrary, they never produced the full, complete 2008 SA. As Meyer explained, Freddie Mac did not produce the complete 2008 SA; instead, Freddie Mac ignored judicial orders and produced only those portions of the 2008 servicing agreement that *it deemed relevant*. [Tr. 501:9-25 – 505:1].

Ms. McKillip admitted that Meyer's testimony about the 2008 SA was contrary to her representations, and that she was provided contrary information by Wells Fargo [Tr. 105:18-23; 107:5-21]. The impact of Meyer's testimony on the trial court was significant, leading to the court's "Wow" moment. [Tr. 129:9-15].

Appellants' description of events leading up the court's "Wow" moment as a mere "oversight or miscommunication between defendants and their counsel" is disingenuous. Substitute Brief for Appellants, at 71. It reflects Appellants' continued refusal to confront the gamesmanship of defendants' trial counsel. Ms. McKillip did not even communicate directly with Freddie Mac, much less "miscommunicate" with Freddie Mac. Further, by her own admission, Ms. McKillip had no communication with Wells Fargo for a crucial six-week period leading up to trial. Appellants' explanation fails to confront these facts, and is transparently insincere.

Finally, Appellants argue that Holm was not prejudiced by their failure to produce the 2008 SA "because the servicing agreement was irrelevant to their claims." Substitute Brief for Appellants, at 76. Appellants then offer a string citation addressing whether servicing guides provide for a private right of action. Substitute Brief for Appellants, at 77.

Holm never asserted a cause of action for breach of the servicing agreement. Nor did Holm ever contend they were third-party beneficiaries of the 2008 SA. Appellants' arguments in this regard are misdirected. Instead, the relevancy of the 2008 SA is that Holm was desperately struggling to finalize a reinstatement of the loan, avoid foreclosure, and continue to live in the family home. The Freddie Mac servicing agreement provides explicit guidance to servicers regarding how they must address homeowners facing those very same life-altering challenges.

For example, a section of the SA addressing loss mitigation directs Wells Fargo to "pursue alternatives to foreclosure whenever possible." [L.F. 195]. Alternatives to foreclosure include "reinstatements." [L.F. 197]. According to Freddie Mac, "[t]he most desirable resolution to a Delinquency is reinstatement. Reinstatement is the act of restoring a delinquent Mortgage to current status." [L.F. 218]. The SA is evidence of Freddie Mac's strong preference for reinstatement, a preference shared by Holm. The SA is relevant to substantiate

Holm's evidence that it was Wells Fargo that declined the reinstatement it promised Holm, and it did so because servicers make more money from foreclosures than from reinstatement, a fact relevant to the trial court's punitive damages analysis.

2. The Defendants' Depositions

Freddie Mac failed to appear for its December 2, 2014 deposition, and also failed to seek a protective order or any relief from the trial court to excuse its non-appearance. Subsequently, the trial court ordered Freddie Mac to appear in the office of plaintiffs' counsel on December 19, 2014. Freddie Mac finally appeared, and its testimony sharply contradicted statements made by its counsel during the course of the litigation.

Appellants argue that Wells Fargo should be excused from its non-appearance at a deposition on January 6, 2015 because "she was under subpoena more than 1,000 miles away." Substitute Brief for Appellants, at 51. Once again, Appellants have not fairly described the record. First, the January 6, 2015 deposition date was explicitly agreed to by Ms. McKillip in a meeting with the special master on December 29, 2014. [Suppl. L.F. 729-33].

Second, Appellants rely on Ms. McKillip's statements on pp. 134-136 of the record, but Ms. McKillip's statements are not true. For example, Ms. McKillip said to the trial court that "We did communicate to Mr. Leyh that Ms. Ott had already been under subpoena . . ." [Tr. 134:6-10]. In fact, however, no such communication ever took place. [Tr. 610:4-9]. Although defendants have subsequently claimed that Ms. Ott was under subpoena or court order to appear in New York, they have never produced the subpoena or court order. Nor have defendants ever explained why Ms. McKillip informed the special master that Wells Fargo would be available on January 6 to complete the deposition. This episode is additional evidence of defendants' continued bad faith relating to discovery abuses.[1]

Appellants still don't take their misbehavior seriously. Appellants assert, for example, that they were diligent and cooperative in discovery, and the trial court's conclusion to the contrary is the result of a big misunderstanding. Substitute Brief for Appellants, at 69, 71,75. Appellants' argument is an affront to the record. The record reveals substantial deprivations of information and discovery obstruction. Whether Appellants destroyed the documents they failed to produce is unknown, but suppression of evidence is sufficient to support sanctions.

The misconduct described in the Statement of Facts and summarized above overwhelmingly justifies the sanctions imposed. Aside from all the other

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[1] Although Appellants continue to rely on the claim that Ott was subject to a subpoena, they have never produced the subpoena. Appellants elsewhere assert a right to jury trial but have failed to produce (despite orders to do so) the Tri-Party Agreement, which ordinarily contains a liberally-worded waiver of jury trial. In both examples, Appellants are seeking to obtain a benefit from their non-disclosure and failure to comply with judicial orders.

documents defendants failed to produce in contravention of a court order, the SA and Tri-Party agreement have direct relevance to plaintiffs' punitive damages claims and to the waiver of jury trial.

F. Appellants' Speculation About the Original Note is Misplaced

Buried in the discussion of sanctions are two paragraphs speculating that "Plaintiffs' counsel well knew that the actual Note was endorsed in blank . . ." Substitute Brief for Appellants, at 81. Appellants' conjecture is deployed in support of a contention that Holm has spun a "fictional narrative" and a "ploy" to create an enormous disadvantage to Appellants. The alleged disadvantage should lead to reversing the sanctions, according to Appellants.

But there was no fictional narrative or ploy relating to the note. In fact, what "Plaintiffs' counsel well knew" is irrelevant to the issue at hand. In Missouri, to recover on a claim under a negotiable instrument, the party "must (1) produce the note, (2) signed by the maker and (3) show the balance due." Affiliated Acceptance Corp. v. Boggs, 917 S.W.2d 652, 656 (Mo. Ct. App. 1996). Production of the original note or, in the event the note is lost or destroyed, a lost note affidavit, "are essential elements of the case because *the instrument itself* is the exclusive ground for the cause of action." Id. (quoting Union Sav. Bank v. Cassing, 691 S.W.2d 513, 514 (Mo. App. 1985)) (emphasis added).

Wells Fargo's "counsel well knew" theory is particularly anomalous in this context, since Wells Fargo never offered the alleged original instrument into evidence at trial. Because of the sanctions, Wells Fargo was prohibited from offering evidence. This legal quandary was of defendants' own making. Although a convenient target, plaintiffs' counsel is not responsible for the decisions made by Appellants generating severe sanctions, and thereby limiting their opportunity to offer evidence at trial. Nor does plaintiffs' counsel have possession of what Wells Fargo claims – without any proof, verification of signatures by Holm, or expert testimony corroborating the existence of the original note – is the actual instrument signed by plaintiffs. Any evidentiary harm arising from Appellants' failure to present evidence of the original note is due to Wells Fargo's own conduct, and is not fairly attributable to Holm or Holm's counsel.

It is also unfair to criticize plaintiffs for offering into evidence a copy of the Holm note mailed to Holm in the summer of 2008 by Kozeny. On June 26, 2008, Kozeny mailed Holm a copy of the deed of trust and the note to "verify the debt which is owed." [L.F. 399-400; Tr. Ex. 26]. The note copy sent by Kozeny was not endorsed and was only enforceable, if at all, by Commercial Federal, the original lender named on the note. This evidence supports Holm's theory that at the time of the foreclosure sale, Holm was not in default to Wells Fargo or Freddie Mac, since both defendants plainly lacked the right to enforce the note and wrongfully foreclosed. Freddie Mac's designated witness wholeheartedly agreed with plaintiffs' theory that defendants lacked a legal right to enforce the note sent to Holm by Kozeny. [Tr. 304:2-25, 305:1-6]. Meyer added those who communicate with borrowers have an obligation to be truthful, accurate and honest. [Tr. 301:10-21]. Wells Fargo failed that test here.

The trial court's imposition of sanctions should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN RULING THAT DEFENDANTS WERE NOT ENTITLED TO A JURY TRIAL (APPELLANTS' POINT VI)

Standard of Review

The trial court's Judgment must be sustained unless "there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1972). Appellate courts should exercise caution before setting aside a Judgment on the ground that it is "against the weight of the evidence," and should only do so when there is a firm belief that the Judgment is wrong. Id. Factual findings by the trial court deserve considerable deference by the court of appeals, and legal conclusions are independently evaluated. Phillips v. Authorized Investors Group, Inc., 625 S.W.2d 917, 919 (Mo. Ct. App. 1981).

Analysis

Appellants sole contention is that they did not waive their right in the manner required by RSMo § 510.190.2. Substitute Brief for Appellants, at 61-2. Appellants' highly abbreviated consideration of the right to a jury trial is not persuasive.

A. The Limited Nature of the Trial

The scope of the trial was narrow. Only Count I (Wrongful Foreclosure) was initially to be tried to a jury rather than to the court. Due to defendants' discovery misconduct, the court struck defendants' pleadings on January 5, 2015, nine days before trial. By striking defendants' pleadings, "the court, in effect, found [Wells Fargo] and [Freddie Mac] liable." See Lewellen, 441 S.W.3d at 150 (2014). Due to the sanctions, and in the interest of fundamental fairness, defendants were barred from participating in the trial on damages, including by examining or cross-examining witnesses and by offering evidence. Defendants were permitted, however, to make objections to evidence.

Due principally to the narrow scope of the trial following imposition of sanctions, Holm waived the right to trial by jury on the day before trial. On the morning of trial, defendants objected to a bench trial and the trial court refused their request for jury trial. The trial court explained the reasons behind its decision at various points during the trial. [Tr. 199:16-25-216:20; 224:6-25-225:1; 580:2-25-586:10].

B. The Sanctions Rendered The Case Uncontested

Rule 61.01(b) and (d) explicitly authorize a trial court to enter an order striking the pleadings or render a judgment by default against the disobedient party. In doing so, a trial court has effectively rendered the case uncontested. See Eidson v. Eidson, 7 S.W.3d 495, 499 (Mo. Ct. App. 1999). A trial court's exercise of discretion to render the case uncontested due to discovery violations should not be disturbed on appeal unless such exercise is unjust. Id.

The practical effect of striking Appellants' pleadings was to find them liable: "In striking Mr. Franklin's and National's pleadings and precluding them from defending against Ms. Lewellen's claims, the court, in effect, found Mr. Franklin and National liable." Lewellen v. Franklin, 441 S.W.3d 136, 150 (Mo. 2014).

In a case where pleadings have been stricken, "the rendition of judgment . . . does not come by default in the ordinary sense but is treated as a judgment upon trial by the court." Karolat v. Karolat, 151 S.W.3d 852, 857 (Mo. App. W.D. 2004) (citing Bell v. Bell, 987 S.W.2d 395, 399-400 (Mo. App. E.D. 1999)); see also Davis, 270 S.W.3d at 476 ("the circumstances differ from those of a true default because the sanction ruling is designed to punish obstructive behavior so as to deter such tactics.")

The legal principle emerging from the cases cited above is that where a party displays a pattern of egregious and intentionally disobedient behavior in discovery, and is severely punished for that pattern of misconduct by having its pleadings stricken and is prohibited from cross-examining witnesses on liability and damages, and is barred from presenting evidence on liability and damages, the natural and logical extension of the punishment is to lose the right to a jury trial. See Scott v. LeClercq, 136 S.W.3d 183, 193 (Mo. App. W.D. 2004).

In LeClercq, suit was filed for money damages arising from alienation of affections. LeClercq misbehaved in discovery and the court struck his answer as a discovery sanction under Rule 61.01. Id. at 193. LeClercq's request for a jury trial on damages was denied. LeClercq's argument that his right to jury trial was abrogated misapprehends the full legal force of a Rule 61.01 sanction striking the pleadings. The effect of a severe Rule 61.01 sanction is "a judgment upon trial by the court." Davis, 270 S.W.3d at 857.

Misbehaving parties agitating for jury trials after judgment has been entered against them may not have it both ways. Here, Wells Fargo wants the benefits of the system for which it repeatedly displayed contempt, to the substantial prejudice of Holm. The better reading – one that aligns with the text of Rule 61.01 and the common law of Missouri – is that the foreseeable and fair result of Wells Fargo's months-long mockery of Missouri's civil justice system is the loss of the right to jury trial.

C. Parties May Also Contractually Waive Jury Trial

Missouri law provides that a party may contractually waive its right to a jury trial. Malan Realty Investors v. Harris, 1997 Mo. App. LEXIS 31 (Mo. Ct. App. 1997). Appellants completely ignore this additional basis for waiver, perhaps because contractual provisions waiving the right to jury trial are common in agreements involving the sale of home mortgage loans. In fact, at least two of the owners of the Holm's note – Commercial Federal Mortgage Corp, the original lender, and Bank of the West[2] – signed an Agreement of Plan of Merger that contained the following term:

> 14.14. WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY INRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS COMPLETATED HEREBY.

[Suppl. L.F. 715]. (Agreement and Plan of Merger dated as of June 13, 2005 Among Bank of the West, Bear Merger Co., Inc., and Commercial Federal Corporation).

D. Defendants Failed To Comply With the Court's Order To Produce Discovery of Sale and Purchase Agreements Relating to Plaintiffs' Note

Plaintiffs attempted to obtain discoverable information relating to each sale of plaintiffs' note, including all sales or purchase agreements, Tri-Party agreements, and all documents evidencing the terms of such sales. [L.F. 299 and 301].

Meyer testified that the Tri-Party agreement is a contract between the

[2] Dean Meyer testified that Freddie Mac purchased plaintiffs' note from Bank of the West. Meyer did not know if Bank of the West bought the note from Commercial Federal or acquired it by virtue of a merger. [Suppl. L.F. 319, 333].

original lender, the servicer and Freddie Mac detailing certain party obligations relating to custody and possession of plaintiffs' note, among other things. [Suppl. L.F. 319, 359]. The standard Tri-Party agreement in the record contains a broad waiver of jury trial. [Suppl. L.F. 737]. Defendants did not comply with the special master's ruling to produce the Tri-Party agreement. The court's Pretrial Order includes an *in limine* ruling stating that "Defendants failed to comply with the special master ruling, and did not produce any documents or other response by noon on Friday, January 2, 2015." [L.F. 423].

The documents suppressed by defendants may well contain the waiver of jury trial language typical of such standard commercial agreements. Defendants' non-compliance with discovery rules and court orders, however, denied the court and plaintiffs the evidence necessary to prove that defendants expressly waived their right to a jury trial. Defendants should not be permitted to withhold discovery, ignore special master rulings, display indifference to orders of the trial court, and then obtain a benefit from their discovery abuses.

Defendants' suppression of evidence here should be treated as spoliation. "Spoliation is the destruction or significant alteration of evidence." Schneider v. G. Guilliams, Inc., 976 S.W.2d 522, 526 (Mo. App. 1998). A party who intentionally spoliates evidence is subject to an adverse inference: "where one party has obtained possession of physical evidence which [the party] fails to produce or account for at the trial, an inference is warranted against that party." Degraffenreid v. R.L Hannah Trucking, 80 S.W.3d 866, 873 (Mo. Ct. App. W.D.

2002) (quoting State ex rel. St. Louis County Transit Co. v. Walsh, 327 S.W.2d 713, 717 (Mo. App. 1959)).

The record demonstrates that (i) plaintiffs requested the Tri-Party agreement [Suppl. L.F. 319, 359], (ii) the special master and trial court ordered that the Tri-Party agreement be produced [L.F. 296-301; Suppl. L.F. 729-33], (iii) the Tri-Party agreement exists [Suppl. L.F. 319 and 359; 504 and 513], and (iv) defendants failed to produce the Tri-Party agreement. [Suppl. L.F. 504, 513]. Defendants acted in bad faith to obstruct the discovery of information relevant to plaintiffs' claims, and to defendants' claim of a right to a jury trial. Under these circumstances, it would be unjust and incongruous for defendants to receive a direct benefit from their intentional suppression of relevant evidence. See Simpkins v. Ryder Freight Sys., Inc., 855 S.W.2d 416, 420 (Mo. Ct. App. W.D. 1993).

E. Defendants' Performance Claiming a Desire for Jury Trial

Defendants went to great lengths to prove that Wells Fargo submitted jury instructions. [Suppl. L.F. 581 at ft. 3]. The Affidavits of Ms. McKillip [L.F. 487-506] and Mr. Blanchard [Suppl. L.F. 717-19] are misleading. There is no dispute that defendants never *filed* any proposed jury instructions. Despite her parsing of language by claiming she "furnished" the Court with proposed instructions, Ms. McKillip admitted that defendants *did not ever file* instructions: "I mean, I have not filed them, that is correct." [Tr. 179:24-25].

The proposed instructions attached to Ms. McKillip's Affidavit are not signed. Under Rule 55.03(a), all pleadings "shall be signed." Thus, whether or not she "furnished" the court with instructions in some heretofore undescribed manner, defendants failed to comply with the court's repeated pleas to *file* proposed jury instructions. Instructions were to be filed before the December 16, 2014 pretrial conference.

Both Ms. McKillip and Mr. Blanchard represented that on January 12, 2015, the court "indicated that Relators' proposed jury instructions had been lost, or not left behind by trial counsel." [L.F. 488; Suppl. L.F. 718]. These statements are false and Judge Elliott promptly set the record straight. [Tr. 180:5-9].

Ms. McKillip then informed the court that "the instructions from the 16th are actually in my car" and "I could definitely go back and fax them over the minute I get back to my offices." [Tr. 181:17-20]. Ms. McKillip did not fax or subsequently file defendants' proposed instructions. [Tr. 211:25 – 212:1-2].

The upshot is that, in addition to their probable jury waiver suppressed by the non-production of the Tri-Party agreement, defendants never actually desired a trial by jury, and never filed any jury instructions in response to the court's repeated requests for defendants' jury instructions. The entire dispute about defendants' right to a jury trial reflects the latest effort to misrepresent facts, put up roadblocks and forestall justice. Appellants are continuing their charade before this court.

The court described the pretense in the following terms on January 14: "And, you know, I think part of their tactic was, clearly, to delay this and to show here this morning and demand a trial by jury as – you know, you knew that wasn't possible." [Tr. 309:12-15]. On January 16, 2015, the court reminded the parties that defendants failed to follow the court's Order to provide proposed jury instructions. [Tr. 581-82]. In light of all the relevant facts, the court observed that defendants "feigned some sort of surprise that there was not a jury here to hear this cause . . . So any indication that counsel for defense was surprised that there wasn't a jury here, I believe, is something less than disingenuous. I think it's just important to note that for the record." [Tr. 581:20-25 – 582:1-7].

F. Defendants Have Not Established A Right to Jury Trial

Wells Fargo's unparalleled discovery misconduct generated a Rule 61.01 sanction, the natural consequence of which is the loss of a right to trial by jury. Further, Wells Fargo concealed evidence (Tri-Party Agreement) and did not comply with court orders to produce documents that reveal its prior waiver of jury trial. A spoliator is not entitled to the benefits of its suppression. The trial court's Judgment denying a jury trial must be affirmed.

III. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF HOLM BECAUSE THERE WAS SUBSTANTIAL EVIDENCE SUPPORTING THE REINSTATEMENT OF THE LOAN, ABSENCE OF DEFAULT, AND DEFENDANTS' LACK OF A RIGHT TO ENFORCE THE NOTE (APPELLANTS' POINT I)

Standard of Review

The trial court's Judgment will be affirmed unless "there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy, 536 S.W.2d at 32. In deciding whether the trial court's Judgment is supported by substantial evidence, "appellate courts view the evidence in the light most favorable to the circuit court's judgment," "defer to the circuit court's credibility determinations," and "accept as true the evidence and inferences . . . favorable to the trial court's decree and disregard all contrary evidence." Ivie v. Smith, 439 S.W.3d 189, 200 (Mo. banc 2014).

Evidence contrary to the Judgment is not considered regardless of the burden of proof at trial. Id. "Circuit courts are free to believe any, all, or none of the evidence presented at trial." Id. Appellate courts should exercise caution before setting aside a Judgment on the ground that it is "against the weight of the evidence," and should only do so when there is a firm belief that the Judgment is wrong. Id. Factual findings by the trial court deserve considerable deference by the court of appeals, and legal conclusions are independently evaluated. Phillips, 625 S.W.2d at 919.

None of the parties invoked Rule 73.01(c) to request findings of fact and conclusions of law. In this circumstance, Rule 73.01(c) provides: "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." The appellate court must affirm the judgment on any basis supported by the record or on any reasonable theory for which there is evidence. Harvey v. Dir. of Revenue, 371 S.W.3d 824, 828 (Mo. App. W.D. 2012).

Analysis

A. The Holms Had An Enforceable Reinstatement Agreement With Wells Fargo

The Judgment stated that the evidence was undisputed that plaintiffs "procured the necessary funds per the agreement" with Wells Fargo to reinstate plaintiffs' loan. [L.F. 450]. Regardless of that agreement, Kozeny proceeded to foreclose. [L.F. 450]. The trial court found that "[p]laintiffs fully and completely complied with the instructions provided by Wells Fargo and Kozeny regarding payment of the reinstatement check." [L.F. 454]. The evidence established that Wells Fargo agreed to cancel the foreclosure sale once the reinstatement offer was accepted by Holms. [L.F. 454].

Appellants rely on evidence the trial court was free to ignore, and Appellants fail to set forth the evidence in the light most favorable to the Judgment. For example, Appellants ignore that Holm consistently pleaded and testified that the loan was not in default, that a reinstatement agreement was made and then breached by Wells Fargo, and that the note was accelerated due to a dispute about the application of insurance proceeds, not because of nonpayment. These are all facts the trial court was entitled to believe. Appellants' failure to comply with the standard of review warrants the denial of the point relied on.

In the event this Court elects to review the appeal despite these deficiencies, the Judgment should be affirmed because there is substantial evidence the parties mutually agreed to a reinstatement. Appellants challenge the Judgment regarding reinstatement by asserting that the issue of reinstatement is outside the scope of the Petition. Substitute Brief for Appellants, at 44-45. However, plaintiffs did plead Wells Fargo's failure to accept reinstatement funds as a basis for wrongful foreclosure relief. [L.F. 19 at ¶ 22]. The Petition specifically alleges that "Defendant WELLS FARGO failed to accept reinstatement funds of 10,306.94 tendered by Plaintiff at Defendants request, proof of which, was faxed to the Defendant on August 15, 2008, the date of the second foreclosure sale. A copy of the certified cashier's check and fax sheet are attached hereto as Exhibit 'B'." [L.F. 19 at ¶ 22].

Appellants find fault with the reinstatement allegation quoted above because "they do not allege the existence of an oral contract obligating Wells Fargo to postpone the sale on the date of the foreclosure before receiving such 'proof' and to accept the untimely proof several hours after the scheduled sale time." Substitute Brief for Appellants, at 44-45. But a party is not obligated to plead evidentiary facts. <u>City of Fenton v. Executive Int'l Inn, Inc</u>., 740 S.W.2d 338, 339 (Mo. Ct. App. 1987). The reinstatement allegation in ¶ 22 of the Petition is more than a conclusion, attaches a document to the Petition evidencing the reinstatement, and is sufficient to provide notice of the claim. <u>See</u> <u>Scheibel v. Hillis</u>, 531 S.W.2d 285, 290 (Mo. 1976). Appellants' contention based on a failure to plead reinstatement should be rejected.

Appellants also quote from Section 27 of the Deed of Trust and claim the reinstatement of plaintiffs' loan was precluded by an oral non-modification clause. Substitute Brief for Appellants, at 45. Freddie Mac purportedly owned the Holm note and was therefore the party entitled to the property in the event of a lawful foreclosure. Freddie Mac's SA, which Wells Fargo was contractually obligated to follow, explicitly waived compliance with oral non-modification clauses. According to Meyer, Freddie Mac's SA permits a borrower to verbally accept an offer of reinstatement:

Q: It would be fully consistent with Freddie Mac's regulations and expectations that a client, a borrower, accept an offer of reinstatement verbally on the phone, right? That would be a valid acceptance?

A: Yes.

Q: And an offer, similarly, can be made by a servicer or a trustee over the phone for reinstatement, right?

A: Yes.

[Tr. 328; see also Tr. 546-556 (on reinstatement)].

Freddie Mac is bound by the testimony supplied in response to a Rule 57.03(b)(4) deposition notice. Koehr, 831 S.W.2d at 929. The testimony set forth above unequivocally establishes that Freddie Mac knowingly waived its right to rely on Section 27 of the Deed of Trust. See Roeder v. Ferrell-Duncan Clinic, Inc., 155 S.W.3d 76 (Mo. Ct. App. S.D. 2004). None of the cases relied on by Appellants on p. 45 of the Substitute Brief address the circumstances of waiver or consider the language of the servicing agreement, and therefore none of those cases controls the outcome here. Although this issue was fully vetted in the court of appeals, Appellants still ignore the legal implication of Freddie Mac's binding testimony that an oral modification to reinstate a loan is valid.

In addition, equitable exceptions exist to the statute of frauds. Mika v. Cent. Bank of Kan. City, 113 S.W.3d 82, 88 (Mo. Ct. App. W.D. 2003). The performance of the terms of the oral agreement by the Holms qualifies as an equitable exception to the statute of frauds. Id.; see also Piazza v. Combs, 226 S.W.3d 211, (Mo. Ct. App. 2007) (actions in reliance on verbal agreement were material and are enforceable as equitable exception to statute of frauds).

Holm sent $10,306.54 to Kozeny in reliance on directions provided by both Wells Fargo and Kozeny. Holm faxed a copy of the cashier's check to Kozeny at the facsimile number provided. David followed up with Wells Fargo by telephone asking how to make future payments. Each of these actions was taken in reliance on statements made by Wells Fargo and Kozeny, and none of these actions would have been undertaken in the absence of a verbal agreement. Therefore, equity makes an exception to the statute of frauds because denying Holm the benefit of the agreement would be unjust. See Mika, 112 S.W.3d at 90 (quoting Shumate v. Dugan, 934 S.W.2d 589, 592 (Mo. App. S.D. 1996) ("An oral contract is valid and enforceable, irrespective of the statute of frauds when there is proof of partial performance in furtherance of an agreement."))

Freddie Mac purports to be a champion of the American homeowner and its

SA demands that servicers reinstate loans whenever possible. [Supp. L.F. 128]. Freddie Mac's directive to servicers is that "[t]he most desirable resolution to a Delinquency is reinstatement. Reinstatement is the act of restoring a delinquent Mortgage to current status." [Supp. L.F. 129].

Freddie Mac mandates that servicers "must accept full reinstatement of a Mortgage if the payment, in cash or certified funds . . ." and must not "refuse to accept a full reinstatement if the Borrower offers to pay all amounts due except for the cost of the BPO, inspection fees and accrued late charges." [Supp. L.F. 132].

In this case, Holm paid the full reinstatement amount on August 15, 2008 and Wells Fargo reneged on its reinstatement agreement. Wells Fargo's decision was contrary to the servicing agreement it was contractually obligated to follow.

Wells Fargo's decision to foreclose notwithstanding a reinstatement agreement is consistent with other Wells Fargo bad faith conduct. For example, in the week following the foreclosure, Wells Fargo through its agent returned Holm's reinstatement check and said: "[t]hese funds are being returned because they are not enough and/or not certified." [Tr. 418:13-16; Tr. Ex. 12]. Since the check *was certified and was in the correct amount*, Wells Fargo and Kozeny were wrong on both counts, leaving Holm "confused." [Tr. 418:17-25, 419:1-5]. In December of 2008, after suit was filed, Wells Fargo offered to reinstate the loan again, this time for $15,751.14. [Tr. 421:3-16, Tr. Ex. 15]. Holm's attorneys then talked to Wells Fargo and a lower reinstatement amount was negotiated. [Tr. 421:23-25, 422:1-7]. Holm attempted once again to put an end to the reinstatement issue by obtaining a check from his mother in the amount of $8,162.24, and sending the check to Kozeny. [Tr. 422:17-24, Tr. Ex. 16]. Again, Wells Fargo failed to reinstate the loan and held the check for more than one year before returning it. [Tr. 421:24, 422:1-13].

Wells Fargo's refusal to accept two agreed-upon reinstatement checks illustrates its disdain for the plight of a Missouri family doing everything in their power to keep their home. These facts contributed to David's claims throughout 2008 that he was not in default on his note. [Tr. 426:21-25].

B. Appellants Misunderstand the Legal Relationship Between Default or Dishonoring a Note, and the Right to Enforce a Note

Appellants focus their claim of error on *default.* Substitute Brief for Appellants, at 40-46. But Appellants' default-related arguments misread Missouri law regarding non-payment of negotiable instruments. The structure of Appellants' legal argument regarding wrongful foreclosure is that even if plaintiffs had challenged Wells Fargo's holder status, plaintiffs still cannot recover damages because they were in default when the foreclosure proceedings began. Substitute Brief for Appellants, at 40-46. Appellants' analysis of the legal relationship between default and their right to enforce a negotiable instrument is legally incorrect and turns the Missouri Uniform Commercial Code ("MUCC") on its head.

It is well-established that RSMo § 400.3-301 permits a "holder" of a negotiable instrument to enforce the instrument. See Bostwick, et al., 414 S.W.3d at 525; see also Fannie Mae v. Conover, 428 S.W.3d 661, 668 (Mo. Ct. App. W.D. 2014). A "holder" is the person in possession of the negotiable instrument (either endorsed in blank or specifically endorsed). RSMo § 400.1-201(20); see also Bostwick, 414 S.W.3d at 525. Unless a negotiable instrument is lost or destroyed, a person entitled to enforce must have possession of "the instrument." "The instrument" means the original paper signed by the maker.

Under the MUCC, once a negotiable instrument is signed, the obligation to pay is *merged* into the instrument. The official commentary to the UCC expresses the point this way: "An instrument is a reified right to payment. The right is represented by the instrument itself." Section 3-203, comment 1. [Respondents' Appendix in the Mo. Ct. App. W.D., at A11-12]. The idea is that the paper itself is treated as if it *is* the claim or debt. See Dale A. Whitman, "Reforming the Law: The Payment Rule as a Paradigm," 1998 Brigham University Law Review 1169, ft. 1 (1998). [Respondents' Appendix in the Mo. Ct. App. W.D., at A21].

The Merger Rule – the instrument is a reified right to payment because the obligation is merged in the instrument – is codified in the MUCC. See RSMo 400.3-310(b) (setting forth the legal requirements of the Merger Rule). The relevant sections of the MUCC do not use the term "default" but speak instead of dishonoring the note. See RSMo § 400.3-502-505. With regard to a negotiable instrument, there is no "default" unless the instrument is dishonored. According to RSMo § 400.3-503(a)(3), "the note is dishonored if it is not paid on the day it becomes payable." The official comments to §§ 3-502(a)(3) and 3-310(b) of the UCC state that dishonor requires the presence of a "holder." For example, the purpose of the dishonor rules is to "allow[] holders to collect notes in ways that make sense commercially without having to be concerned about a formal presentment on a given day." § 3-502(a)(3), official comment 2 [Respondents' Appendix in the Mo. Ct. App. W.D., at A18]; <u>see</u> <u>also</u> § 3-310(b), official comment 3 ("If the check or note is dishonored, the seller may sue on either the dishonored instrument or the contract of sale *if the seller has possession of the instrument and is the person entitled to enforce it*.") (emphasis added). [Respondents' Appendix at A15].

These general payment principles linking dishonor to the person entitled to enforce the note are also set forth in the Report of the Permanent Editorial Board for the Uniform Commercial Code dated November 14, 2011 ("PEB Report"). The PEB Report was prepared as a guide after it became "apparent that not all courts and attorneys are familiar with" the provisions of the UCC, a diplomatic way of saying there exist many confusing opinions and briefs analyzing the UCC. The PEB Report addresses a maker's payment obligations, and demonstrates that the concepts of payment and dishonor are inextricably tied to the person entitled to enforce the note. <u>See</u> PEB Report, at p.4 [Respondents' Appendix in the Mo. Ct. App. W.D., at A64]. In other words, *there is no default or legal failure to pay unless there is* ***a person entitled to enforce the note.***

C. <u>Default Does Not Confer A Legal Right to Enforce A Note</u>

The foregoing analysis demonstrates that dishonor or "default" have no statutory meaning absent the presence of a legitimate "holder" or PETE (person with right to enforce under RSMo § 400.3-301). Declaring that a party is in "default" *confers no legal right to enforce the note whatsoever under the MUCC*. To enforce the note, a party claiming injury from the dishonoring of a note must demonstrate that it has possession of the original paper (e.g., as a holder or non-holder in possession of the rights of a holder).

Appellants' failure to recognize the statutory linkage between dishonor and the right to enforce the note undercuts their claims about the legal significance of "default." If plaintiffs successfully challenged Wells Fargo's holder status – as they did in this case – then, even if plaintiffs never made a single payment on their note, they could not be found to have dishonored their note such that *Wells Fargo or Freddie Mac* could foreclose. The right to enforce a note following its dishonor requires holder or PETE status. Appellants appear oblivious to these controlling statutory provisions.

The point was vividly made by Judge Young of the United States District Court for the District of Massachusetts:

> It is beyond peradventure that Culhane is substantially behind in paying her mortgage and appears unable to remediate her default. This, however, does not render her an outlaw, subject to her having her home seized by whatever bank or servicer may first lay claim to it. She still has legal rights. Everything that follows attempts to sort

out these competing claims.

Culhane v. Aurora Loan Services of Nebraska, 826 F.Supp.2d 352, 359 (D. Mass. 2011).

Taking care to make certain that foreclosures are undertaken only by parties with a legal right to do so is not a minor procedural detail, especially in a nonjudicial foreclosure state such as Missouri. The rule requiring possession of the original note is designed to protect borrowers from multiple attempts to enforce the same debt. See Barker v. Danner, 903 S.W.2d 950, 955 (Mo. Ct. App. 1995) ("The only interest of the obligor being that he shall be required to pay his debt to but one person."); see also State ex rel. Williams v. Williams, 647 S.W.2d 590, 593 (Mo. Ct. App. 1993) ("The legitimate interest of a judgment debtor is to secure of record all proper credits on the judgment, the consequence of which is that the debt may be enforced only once.")

Foreclosing on Holm's note requires following all the requisite legal procedures, including presenting the original note in evidence and proving proper endorsements. See Affiliated, 917 S.W.2d at 656 (party seeking to enforce note "must produce the note"); see also Sallie Mae v. Holloway, 25 S.W.3d 699, 701 (Mo. App. W.D. 2000) ("Absent presentment of the note or proof that it was lost or destroyed, a judgment based on the instrument fails for want of substantial evidence to support it.")

So, even if Holm was in default, which Holm denies, it does not legally or logically follow that Wells Fargo or Freddie Mac had the right to foreclose.

Default does not turn Holm into an outlaw without rights. Wells Fargo and Freddie Mac must establish their right to enforce the note before a foreclosure is lawful. See Williams v. Kimes, 996 S.W.2d 43 (Mo. 1999) (foreclosure sale void if foreclosing party lacks title to secured note). For the reasons set elsewhere in this brief, Appellants failed to do so.

D. Wells Fargo Was Not A Holder of the Note

Trial Exhibit 26 is a copy of the note that Kozeny claimed established the validity of the debt. Trial Exhibit 26 is clearly unenforceable by Wells Fargo or Freddie Mac, since the note does not contain any endorsements and neither is the Lender. See Bostwick, 414 S.W.3d at 525; see also Holloway, 25 S.W.3d at 701. Holm's note was not enforceable by Wells Fargo or Freddie Mac, and therefore a default by the Holms, which they deny, could not confer any legal rights of either of them. The trial court's Judgment must be upheld.

Appellants contend that the issue of the note's enforceability was outside the pleadings. Substitute Brief for Appellants, at 46. The trial court rejected that argument on May 20, 2014, and the parties undertook discovery on the subject of defendants' compliance with MUCC. The enforceability of a note through foreclosure is at the heart of wrongful foreclosure actions, since in the absence of an enforceable note there can be no default or lawful foreclosure. See Kimes, 996 S.W.2d at 45 (foreclosure sale is void when foreclosing party does not hold title to secured note).

Evidence in a Trustee's Deed is rebuttable. See Hobbs v. Dir. of Revenue, 109 S.W.3d 220, (Mo. Ct. App. S.D. 2003) (prima facie evidence will establish a fact unless other evidence contradicts that fact). In this case, the testimony of Holm denying default, evidence of an enforceable reinstatement agreement, and an unenforceable note due to the lack of endorsements is clearly substantial evidence contradicting a statement in the Trustee's Deed. Appellants are wrong to suggest otherwise.

Appellants' claim that "Kozeny did not represent that [Trial Exhibit 26] was a 'complete' or 'true and accurate' photocopy of the Note or that it established that Wells Fargo was a proper holder, but merely that it verified the debt – which it did by showing that plaintiffs had executed the note" is a tangle of deception. Freddie Mac, for example, expects trustees to be accurate and honest when communicating to borrowers. [Tr. 301:18-22]. When a Freddie Mac trustee tells a borrower that an attached note establishes the validity of that homeowner's debt, such a statement should be truthful and reliable. [Tr. 300:17-23; 301:10-17]. Legalisms about a "true and accurate" copy are simply excuses offered by Appellants to justify deception to a borrower. Finally, Trial Exhibit 26 cannot verify the existence of debt to *Wells Fargo or Freddie Mac* unless it is endorsed. <u>See</u> <u>Bostwick</u>, 414 S.W.3d at 525. It was not endorsed, and so Appellants' claim is without merit.

Appellants repeatedly assert that the note was properly endorsed and that Wells Fargo was the holder of the note. Substitute Brief for Appellants, at 46-49. Appellants misapprehend the requirements of Missouri law for enforcing notes.

Appellants are not entitled to be declared a holder of the note because there was no evidence that Wells Fargo possessed the original instrument signed by Holm, or that the original instrument was properly endorsed. The original instrument was not in evidence and is not part of this record, a fact which defeats Appellants' contention regarding holder status. See RSMo § 400.3-301 (requiring possession of the original instrument unless it is lost or destroyed).

Had defendants not committed unprecedented discovery misconduct in this case, perhaps they could have offered the alleged original note into evidence for the trial court to consider and evaluate. See Affiliated Acceptance Corp., 917 S.W.2d at 656 (party seeking to enforce note "must produce the note"); see also Holloway, 25 S.W.3d at 701.

Barred from offering the note in evidence by their self-inflicted wound, Appellants resort instead to innuendo and "what ifs." On this record, and for the additional reasons supplied above, the trial court's Judgment regarding the unenforceability of Trial Exhibit 26 must be affirmed.

E. Appellants Failed To Preserve The Point Concerning Allocation of Insurance Proceeds

Appellants' argument relating to the allocation of insurance proceeds has not been preserved for review. Appellants failed to object to the evidence at trial relating to insurance proceeds. [Tr. 390:4-17; 394:2-25; 395:1-23]. Nor did Appellants submit any objection relating to insurance proceeds in the post-trial memorandum in support of judgment or in the motion for new trial. [L.F. 458-

478]. Therefore, nothing is left for the appellate court to review. Syn, Inc., 200 S.W.3d at 135.

IV. THE TRIAL COURT DID NOT ERR IN AWARDING EMOTIONAL DAMAGES TO HOLM (APPELLANTS' POINT V)

In Point V, Appellants assert that the Judgment to award $200,000 to plaintiffs for their emotional distress must be reversed because there was no medical testimony offered at trial. Appellants conflate "medically diagnosable" with a requirement to present expert medical testimony at trial.

Holm acknowledges that emotional distress damages depend on evidence of a medically diagnosable and medically significant event. Bass v. Nooney Co., 646 S.W.2d 765, 772-773 (Mo. banc 1983). But that evidence may be presented in the form of testimony from a plaintiff establishing the necessary predicates. See Lipari v. Volume Shoe Corp., 664 S.W.2d 953, 958 (Mo. Ct. App. 1983) (no medical testimony required to establish anxiety and nervousness since they are the natural and expected consequences of the indignity suffered); see also Fust v. Francois, 913 S.W.2d 38, 48 (Mo. Ct. App. 1995) (medical testimony not required to prove mental distress damages).

Emotional distress damages are recoverable in a wrongful foreclosure case. See Medlock v. Farmers State Bank, 696 S.W.2d 873, 878-881 (Mo. Ct. App. 1985) (emotional distress damages are available in a wrongful foreclosure action but not when foreclosure is attempted but not undertaken); see also Dobson v.

Mort. Elec. Registration Sys., 259 S.W.3d 19, 22 (Mo. Ct. App. 2008) (in wrongful foreclosure action, trial court awarded emotional distress damages in the amount of $300,000 but judgment reversed due to failure to plead absence of default.").

Appellants' reliance on Henry v. Farmers Ins. Co., 444 S.W.3d 471 (Mo. Ct. App. 2014) ignores the history of emotional distress damages in wrongful foreclosure cases as a necessary and natural consequence of the tortious conduct, placing the Judgment well within the framework of Henry. See id. at 482 (plaintiffs excused from the Bass requirements when emotional distress damages "occur as a necessary and natural consequence of the tortious conduct.") Loss of a family's living space, the place where parents raise their children and seek refuge from the outside world, is surely the kind of tort giving rise to emotional damages as a necessary and natural consequence of the underlying harm.

In this case, in addition to providing testimony about her own anxiety and fear, Crystal Holm testified that David's physical health had deteriorated over a six-year period due to the threat of foreclosure. [Tr. 457:23-25, 458:4-9]. David wore a heart monitor and suffered panic attacks, all of which was physically demanding and took a toll on his health and their marriage. [Tr. 458:6-24].

David supplied additional details concerning a visit to his personal physician about two hours for the scheduled foreclosure sale. [Tr. 4-5:11-20]. Because of his stress level that day, David's doctor placed a heart monitor on his body, and sent him to the hospital for evaluation of the heart monitor results. [Tr. 406:1-8]. In addition, David was suffering from panic attacks. [Tr. 406:7-8].

The trial testimony provided by Crystal and David clearly establishes medically diagnosable and medically significant events. The Judgment correctly described the testimony provided at trial. Appellants never explain why the testimony described above fails to constitute medically diagnosable and medically significant facts. The stressful nature of what David and Crystal went through for years regarding their loan and foreclosure status is not difficult to comprehend. The award of $200,000 is supported by the evidence.

Appellants also argue that Holm failed to plead special damages. The Petition alleges, however, that the defendants' conduct was 'intentional, knowing, willful, malicious and outrageous, and warrants an award of punitive damages." [L.F. 20, at ¶ 26]. Wells Fargo was therefore on notice that Holm was seeking damages that were the necessary and probable consequence of the wrongful foreclosure. Medlock, 696 S.W.2d at 878-9. When malice and willfulness are alleged, emotional distress is understood to be a natural consequence of the underlying wrong. Id.; see also Fetick v. American Cyanamid Co., 38 S.W.3d 415, 419 (Mo. 2001) (court holds that medically diagnosable and medically significant emotional distress damages available in case of willful fraud).

The Judgment's award of $200,000 in emotional distress damages should be affirmed.

V. THE TRIAL COURT DID NOT ERR IN ENTERING

JUDGMENT FOR PLAINTIFFS ON THEIR QUIET TITLE CLAIM (APPELLANTS' POINT II)

Standard of Review

The trial court's Judgment must be sustained unless "there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy, 536 S.W.2d at 32. Appellate courts should exercise caution before setting aside a Judgment on the ground that it is "against the weight of the evidence," and should only do so when there is a firm belief that the Judgment is wrong. Id. Factual findings by the trial court deserve considerable deference by the court of appeals, and legal conclusions are independently evaluated. Phillips, 625 S.W.2d at 919.

Analysis

Appellants' quiet title argument treats quiet title as a form of damages for wrongful foreclosure, rather than as a special statutory cause of action that may be brought in equity or at law. RSMo § 527.150. Appellants essentially contend that wrongful foreclosure plaintiffs must choose between monetary damages or quiet title relief. Appellants' Brief, at 32. Appellants ignore the reasoning set forth in the Judgment and confuse the two discrete concepts of quiet title and wrongful foreclosure damages.

The Judgment for plaintiffs on Count II is predicated on the holding in Willams v. Kimes, 996 S.W.2d 43, 45 (Mo. 1999). [L.F. 451]. Appellants do not bother to mention or discuss Kimes. Thus Appellants never explain how, if the foreclosure sale is void due to the unenforceability of the note, plaintiffs ever lost title in the first place. Under Kimes, the parties to a wrongful sale are placed in their *ex ante* positions. Id. at 46. Viewed in their *ex ante* position, the Holms had title to the property. Freddie Mac's only claim to title was through the foreclosure sale that was voided due to the absence of a note enforceable by Wells Fargo.

None of the cases relied upon by Appellants hold that Missouri law bars quiet title relief when a plaintiff is awarded monetary damages for wrongful foreclosure. Kennon v. Camp, 353 S.W.2d 770, 777 (Mo. 1962) and Peterson v. Kansas City Life Ins. Co., 98 S.W.2d 770, 775 (Mo. 1936), for example, do not involve quiet title claims. Instead, the cases address whether a party may have monetary and equitable relief when suing for wrongful foreclosure. Neither case applies to the facts there.

Because Appellants avoid Kimes and the actual reasoning relied upon by the trial court, and because the cases relied upon are distinguishable, the Judgment in favor of plaintiffs for quiet title must be affirmed.

VI. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FOR PLAINTIFFS ON CLAIMS FOR ECONOMIC DAMAGES BECAUSE THERE IS SUBSTANTIAL EVIDENCE SUPPORTING A DIFFERENCE BETWEEN THE REASONABLE MARKET VALUE OF THE PROPERTY AND THE AMOUNT OF THE DEBT, AND THE

EVIDENCE ESTABLISHED LOST VALUE IN THE PROPERTY (APPELLANTS' POINTS III and IV)

Standard of Review

The trial court's Judgment must be sustained unless "there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy, 536 S.W.2d at 32 (Mo. banc 1972). Appellate courts should exercise caution before setting aside a Judgment on the ground that it is "against the weight of the evidence," and should only do so when there is a firm belief that the Judgment is wrong. Id. Factual findings by the trial court deserve considerable deference by the court of appeals, and legal conclusions are independently evaluated. Phillips, 625 S.W.2d at 919.

Analysis

Plaintiffs are entitled to "any damages" that "fairly and justly compensate" them for wrongful foreclosure. MAI 4.01; see also Blanks v. Flour Corp., 2014 Mo. App. LEXIS, at *147 (Mo. Ct. App. 2014). There is no "distinction, as it relates to the measure of damages, between this [foreclosure] action and other actions for damages." Edwards v. Smith, 322 S.W.2d 770, 777 (Mo. 1959).

Contrary to Appellants' contention, a "before and after" measurement of the lost value of property is an approved means of ascertaining tort damages involving land. See Bowers v. Hog Builders, Inc., 461 S.W.2d 784, 797-98 (Mo. 1970). In this case, there is no factual dispute based on David Holm's testimony that the difference in value before and after the foreclosure is $89,762.30.

Appellants' reliance on Adkison v. Hannah, 475 S.W.2d 39 (Mo. 1972) is misplaced. Adkison was a conspiracy case specifically alleging a conspiracy "to force the defendants into default under the deed of trust," and enabling the conspirators to buy the property at a foreclosure sale. Id. Because the object of the conspiracy focused on "the date of the foreclosure sale," the court relied on that fact to describe the measure of damages in that case. But the Adkison court found insufficient evidence to support the damage sought, and did not make a broader ruling as to the types of damages allowable in a wrongful foreclosure case. Id. at 42.

Here, by contrast, plaintiffs alleged that the value of their home decreased substantially *since 2008*. Regarding a specific claim for damages from 2008 to the present, plaintiffs are not limited to the difference in value between the reasonable market value and the amount of liens on the date of the foreclosure sale. Such a measure of damages fails to account for the amounts required to "fairly and justly compensate" plaintiffs for their injury. See Edwards, 322 S.W.2d at 777.

Substantial evidence was offered to show that the value of the property declined from 2008 to the date of trial. David testified that, based on a recent appraisal, the value of the home at the time of trial was $52,000. According to the note and Deed of Trust, Holm purchased the property for $138,200. [Tr. Ex. 1 and 26]. The property was purchased at the foreclosure sale by Freddie Mac for $141,762.30. [Tr. Ex. 3]. Thus, assuming the value of the property on the date of the foreclosure sale was the amount paid ($141,762.30), the loss in value suffered by Holm was $89,762.30. This amount is the natural and foreseeable consequence of the wrongful foreclosure, and is recoverable damage.

Also, Holm presented substantial evidence to prove that $6,150 was spent undertaking necessary repairs on the house after the foreclosure sale. [Tr. Ex. 40]. This repair cost was proximately caused by the wrongful foreclosure since, following the foreclosure, a homeowner no longer has legal title to the home and is often reluctant to undertake repairs for the potential benefit of another party. Holm, however, incurred that repair expense and would not have done so but for the wrongful acts of Wells Fargo in foreclosing on the property.

Finally, even if this court applies the more limited measure of damages set forth in Adkison, Holm still suffered substantial economic loss due to the foreclosure sale. Under Adkison, the measure of damages is the value of the property in excess of the debt. Adkison, 475 S.W.2d at 43 ("the measure of damages for wrongful foreclosure of a deed of trust is 'the difference between the reasonable market value of the property and the aggregate amount of the liens thereon at the date of the foreclosure sale'") (quoting Edwards, 322 S.W.2d at 777).

The court of appeals mistakenly claimed that Holm did not present evidence of the loss of equity and therefore may not be awarded economic damages under Adkison. However, substantial evidence was presented showing that because neither Wells Fargo nor Freddie Mac had a right to enforce the debt, Holm owed nothing to either defendant. Commercial Federal Mortgage, by contrast, might have a right to collect payment of the note since it was identified as the Lender on the note, but Commercial Federal Mortgage is a non-party that was uninvolved in the foreclosure. Therefore, under Adkison, the debt was zero and the value of the property was $141,762.30, the amount paid by Freddie Mac to purchase the property. [Tr. Ex 3]. Applying the Adkison damages framework, the amount of Holm's economic damages, in addition to damages for emotional distress, is $141,762.30.

VII. THE TRIAL COURT DID NOT ERR IN AWARDING PUNITIVE DAMAGES IN THE AMOUNT OF $2,959,123 BECAUSE WELLS FARGO INTENTIONALLY HARMED HOLM AND THE AWARD IS WITHIN THE ACCEPTABLE RATIO (APPELLANTS POINTS VIII, IX AND X)

Standard of Review

The trial court's Judgment must be sustained unless "there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy, 536 S.W.2d at 32 (Mo. banc 1972). Appellate courts should exercise caution before setting aside a Judgment on the ground that it is "against the weight of the evidence," and should only do so when there is a firm belief that the Judgment is wrong. Id. Factual findings by the trial court deserve considerable deference by the court of appeals, and legal conclusions are independently evaluated. Phillips, 625 S.W.2d at 919.

Analysis

Appellants' various criticisms of the court's punitive damages award lack merit. First, Appellants' claim that the amount of punitive damages is limited by RSMo § 510.265.1 has not been preserved for review. No objection was made to the claim of punitive damages in the amount of $16.7 million during trial. [Tr. 569:10-25 - 571]. Following trial, defendants submitted a Consolidated Proposed Trial Order and Judgment and Suggestions in Support, but failed to request that the court consider RSMo § 510.265.1. [Supp. L.F. 563-590]. Proper preservation of error requires that specific objections be made to allow the trial court to make an intelligent ruling. McGuire v. Kenoma, 375 S.W.3d 157, 174 (Mo. Ct. App. W.D. 2012) (point of appeal must be based on objection at trial).

Second, Lewellen controls application of § 510.265.1. Appellants are wrong to claim that Federal Nat'l Mortg. Ass'n v. Howlett, 521 S.W.2d 423, 431 (Mo. 1975) holds that "no claim for wrongful foreclosure existed in 1820. Appellants' Brief, at 60. Howlett does not address the right to a jury determination of wrongful foreclosure damages in 1820, and is therefore silent on relevant issue. Finally, plaintiffs' selection of a bench trial is not a waiver of their right to uncapped punitive damages. To claim otherwise would infringe on plaintiffs' constitutional right of access to courts. See Klimer v. Mun, 17 S.W.3d 545, 548 (Mo. 2000).

Third, Wells Fargo intentionally deprived plaintiffs of the benefit of a reinstatement agreement in order to elect an outcome more preferable to Wells Fargo: displacing the Holm family through a foreclosure sale. The evidence was undisputed that Holm paid Wells Fargo the precise amount demanded for reinstatement in the exact form requested, a cashier's check. Every term of the reinstatement was completely satisfied by plaintiffs.

Plaintiffs' evidence established that Holm immediately accepted the offer, but Wells Fargo deliberately ignored the reinstatement deal and, in an egregious and deceitful manner, intentionally foreclosed on Holm's family home. Wells Fargo acted dishonestly in order to obtain reimbursement of fees it charged against the Holm's note. In other words, Wells Fargo knowingly inflicted a severe injury on David and Crystal Holm in order to satisfy its insatiable appetite for more fees.

Meyer testified that there is nothing in the Freddie Mac SA stating that a reinstatement check must be received before the foreclosure sale. [Tr. 509:17-23]. This is particularly true when the servicer and trustee make explicit promises to a borrower that they will not foreclose.

Fourth, Wells Fargo could easily have kept its word and reinstated the loan. No major hurdles were required to say "yes" rather than "no." For example, Freddie Mac testified that it considered reinstatement of the Holm note to be the most desirable of all possible outcomes. Freddie Mac's SA champions reinstatement, and requires that servicers comply with its guidelines. Wells Fargo willfully disregarded Freddie Mac's SA in order to pursue its quest for more fees by foreclosing on the Holm property.

Fifth, the result of Wells Fargo's egregious conduct was to impose approximately eight years of uncertainty, humiliation, emotional distress, and family paralysis on David, Crystal and Liberty Holm. The evidence demonstrated clearly and convincingly that a substantial personal toll has been taken on the Holm family. Appellants' effort to minimize the human toll of potential homelessness, depression, physical illnesses, and humiliation arising from a foreclosure sale as merely "a transaction in the economic realm," reflects Appellants' continued failure to take this case or their conduct seriously.

Sixth, the evidence established that Wells Fargo's intentional choice to foreclose arose from its own financial incentives. Dr. Kurt Krueger testified that Wells Fargo had financial incentives to seek reimbursement of its fees at a foreclosure sale. [Tr. 488:6-490:13] This economic motivation collided with the well-being of Holm, and was contrary to the interests of Freddie Mac. In other words, in this case, a powerful financial company exerted its will over a financially distressed family in Clinton County, Missouri. The result is predictable. The plaintiffs were severely damaged; Wells Fargo took its money and moved on, in complete disregard of the human damage it left behind.

Seventh, Wells Fargo is an experienced servicer of home loans. Wells Fargo knew that its decision to foreclose after reinstatement was accepted would inflict a devastating injury on the Holm family. Wells Fargo's actions were knowing, intentional and injurious.

Eighth, Wells Fargo operated from a position of superiority provided by its enormous wealth. Wells Fargo's decision took advantage of an obviously financially vulnerable family.

Ninth, Wells Fargo has shown no remorse for the harm it caused to David and Crystal Holm. Neither Wells Fargo nor Freddie Mac had a corporate representative at trial. [Tr. 334-532]

Tenth, the punitive damages award was well within the acceptable ratio in Missouri. Lewellen, 441 S.W. 3d at 147-148.

VIII. CONCLUSION

Freddie Mac testified that eight years of litigation over receipt of a full reinstatement check incorrectly described by Wells Fargo as four and one-half hours late is "unfortunate." When specifically asked if Freddie Mac "would have loved the reinstatement to occur in August of 2008, right," Meyer replied "Correct." [Tr. 266:25-267:12]. Freddie Mac promotes reinstatements and expects servicers to go the extra mile to reinstate loans when a borrower has the means to pay. [Tr:289:6-12]. In hindsight, and based on all of the facts in evidence at trial, Freddie Mac testified that *it would have been better to reinstate the Holm loan*. [Tr:294:5-9].

Wells Fargo stood in the way of that outcome jointly preferred by Holm and Freddie Mac. Wells Fargo intentionally denied Holm the reinstatement it had agreed to just hours before. Wells Fargo purposefully conducted this litigation in a manner disobedient to the trial court, the special master, and to the rights of Holm to discoverable information.

This court should affirm.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Substitute Brief for Respondents complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this Substitute Brief contains 23,651 words, excluding the cover, this Certificate, the Certificate of Service, and the signature block, as determined by the Microsoft Word 2010 Word-counting system. This Substitute Brief has been scanned for viruses on November 15, 2016 using the program Microsoft Security Essentials, which was installed on August 4, 2010. According to those programs, this Brief is virus-free.

/s/ Gregory Leyh
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I electronically filed the foregoing Substitute Brief for Respondents with the Supreme Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Gregory Leyh
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