IN THE
MISSOURI SUPREME COURT

No. SC95755

CRYSTAL G. HOLM AND DAVID E. HOLM,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

Appeal from the Circuit Court of Clinton County
Hon. R. Brent Elliott

SUBSTITUTE REPLY BRIEF FOR APPELLANTS WELLS FARGO HOME MORTGAGE, INC. AND FEDERAL HOME LOAN MORTGAGE CORPORATION

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INTRODUCTION

Although defendants' substitute brief ("Br.") contains ten points relied on, the Argument in plaintiffs' substitute brief ("RespBr.") has only eight sections, which do not correspond to defendants' points. Plaintiffs may have hoped that by mixing up the order, the Court might overlook that plaintiffs have no answer for many of defendants' arguments. Instead, plaintiffs concentrate on misrepresenting discovery squabbles and defending the extreme sanctions award. Plaintiffs' few attempts at legal analysis are strained and unconvincing.

Nor can plaintiffs' factual accounts be taken at face value. For example, defendants thoroughly explained, with record support, that plaintiffs never specifically requested the "2008 servicing agreement" (Br.-3-4, 9-11, 16, 68-72). In response, plaintiffs refer to a "private discussion" in which defense counsel "was well aware" the focus was "the 2008 SA" (RespBr.-48). Plaintiffs' description of this supposed off-the-record colloquy does not square with the transcript that preceded it (Tr.-14:4-17:6); plaintiffs' subsequent request for sections of the agreement dated as early as 1997 and as recently as 2014 (L.F.-751-89; Apdx-A-18-57); or plaintiffs' sanctions motion, which does not refer to the "2008" agreement (L.F.-100).

In addition, plaintiffs assert that defendants' trial counsel had remarked before trial that "she had been unable to communicate with Wells Fargo … 'for six weeks,'" demonstrating Wells Fargo's "contempt" (RespBr.-39). Plaintiffs' assertion is based solely on *plaintiffs' counsel's* hearsay testimony – over defendants' objection and without prior notice – at the post-trial hearing (Tr.-604:21-605:14, 609:19-22). Tellingly, plaintiffs' counsel did not mention the alleged statement until he took the unorthodox and impermissible step of testifying at the hearing, which defendants' trial counsel did not attend. *See Finch v. Finch*, 442 S.W.3d 209, 214 (Mo.App. 2014) (evidence is admissible under Rule 78.05 only when after-trial motion requires resolution of issue not based on record facts; court declined to consider evidence that husband "failed to present at trial").

Word-count limitations prevent us from identifying every unaddressed issue or all of plaintiffs' erroneous or unfounded factual and legal statements, but those discussed below demonstrate the Judgment cannot stand.

ARGUMENT

I. Wells Fargo is entitled to judgment on plaintiffs' wrongful-foreclosure claim.

Plaintiffs do not challenge many of Wells Fargo's points concerning plaintiffs' insufficient proof on their wrongful-foreclosure claim, including (a) that plaintiffs' evidence showed their last mortgage payment was in February 2008 (Br.-42); or (b) that plaintiffs were not entitled to have the disputed insurance proceeds applied to their loan balance, and the proceeds would not have cured their default anyway (Br.-42-43).[1/] When they do respond to Wells Fargo's Point I, plaintiffs misframe the issue. The question is not whether Wells Fargo had the right to enforce plaintiffs' Note – although it did – but whether plaintiffs were entitled to bring a wrongful-foreclosure claim for damages. They were not.

Plaintiffs first rely upon their compliance with the alleged oral reinstatement agreement to avoid foreclosure. Even if this alleged agreement were enforceable, an unaccepted tender would give rise to an equitable claim for rescission, but not a tort claim for wrongful foreclosure. *Peterson v. Kansas City Life Ins. Co.*, 98 S.W.2d 770, 774 (Mo. 1936). Because plaintiffs were in default when foreclosure proceedings began, they are not entitled to damages (Br.-46-47).

[1/] Contrary to plaintiffs' waiver argument (RespBr.-77-78), after moving in limine to exclude the evidence (L.F.-312-13), defendants made a continuing objection to the relevance of evidence regarding property damage and insurance (Tr.-388:13-19).

Plaintiffs claim, without citation, that they were not in default (RespBr.-65, 74). But they do not dispute that the only evidence they offered denying default was Holm's response, "No," to his counsel's question whether he "believe[d]" he was in default (Br.-23; Tr.-427:21-25). The applicable standard of review under *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976), does not leave trial courts free to credit a party's unsupported "belief" and disregard all other undisputed evidence. *Buckner v. Jordan*, 952 S.W.2d 710, 712 (Mo. 1997). Indeed, plaintiffs' prima facie evidence established their default and their other evidence demonstrated that their last payment was in February 2008 (Br.-41-42). Plaintiffs offered no evidence to negate these undisputed, evidentiary facts. Their mere denial of default does not equate to proving non-default.

Plaintiffs have no response to the legal authorities holding that their purported oral reinstatement agreement with Wells Fargo was unenforceable under §27 of the Deed of Trust (Br.-45-46; *see also Klinckman v. Pharris*, 969 S.W.2d 769, 772 (Mo.App. 1998)). Instead, plaintiffs suggest that under Freddie Mac's servicing agreement, Wells Fargo was permitted to enter into oral agreements with borrowers (RespBr.-67). But plaintiffs concede that they were not third-party beneficiaries of that agreement (RespBr.-50), and they therefore have no right to enforce it. Plaintiffs' argument that Freddie Mac waived reliance on §27 (RespBr.-67) muddles the difference between the holder of a note (here, Wells Fargo), which has the right to enforce the note and deed of trust through foreclosure, and the owner of a note (here, Freddie Mac), which has the right to any payments collected. *Federal Nat'l Mortg. Ass'n v. Conover*, 428 S.W.3d 661, 668-69 (Mo.App. 2014); §400.3-203, cmt. 1. Plaintiffs' discussion of equitable exceptions to the statute of frauds is inapposite, because under §27 plaintiffs could have had "no contractual expectancy" that any oral promises would be binding and enforceable. *Reliance Bank v. Paramont Properties, LLC,* 425 S.W.3d 202, 207 (Mo.App. 2014).

In any event, plaintiffs did not plead the existence of an oral reinstatement agreement and ask the Court to overlook that they pleaded "reinstatement" only in the context of alleging that defendants did not comply with §19 of the Deed of Trust – an argument they did not pursue at trial (Br.-44). Plaintiffs did not ask the court to conform the pleadings to the evidence and cannot reinvent their allegations on appeal.

Plaintiffs next raise a convoluted argument, newly-minted on appeal, that seeks to excuse their default (RespBr.-70-72). Citing no cases, they assert that "dishonor or 'default' have no statutory meaning absent the presence of a legitimate 'holder'" or person entitled to enforce the note (RespBr.-73). Because – according to plaintiffs – Wells Fargo was not the holder of the Note, plaintiffs' non-payment does not constitute default "such that *Wells Fargo or Freddie Mac* could foreclose" (RespBr.-73). But "default" is defined by the Note and Deed of Trust. *See Bank of Missouri v. South Creek Props., LLC,* 455 S.W.3d 47, 55 (Mo.App. 2014) (relevant instruments "both provided a default occurred if any payment was not made when due"). Plaintiffs' Note and Deed of Trust describe "default" in terms of the borrower's failure to pay, without requiring the presence of a holder. Plaintiffs' Note states, "[i]f I do not pay the full amount of each monthly payment on the date it is due, I will be in default" (L.F.-207). The Deed of Trust describes default more expansively, encompassing "breach of *any* covenant or agreement," including the agreement to pay, when due, principal and interest (L.F.-34-¶22).

Plaintiffs attempt to confuse this everyday concept of default by sprinkling UCC provisions throughout their argument. The "merger" rule, §400.3-310, merely provides that when a party accepts a note, the borrower's obligation to pay the debt in full is suspended until the debt matures or the borrower defaults. Section 400.3-502(a)(3) governs dishonor, and provides that "the note is dishonored if it is not paid on the day it becomes payable," which is the same as default. Comment 3 to §400.3-502(a)(3) *refers* to holders, but that reference does not engraft a requirement that a holder be present for non-payment to constitute dishonor, as plaintiffs maintain (RespBr.-73). In any event, plaintiffs' effort to link default and dishonor to the presence of a holder also fails because plaintiffs "waived the rights of Presentment and Notice of Dishonor" (L.F.-207-¶9).

Plaintiffs disregard cases holding that a plaintiff's non-default is an indispensable element of a wrongful-foreclosure claim for damages, and rely instead on cases involving suits *against* borrowers to recover debts (RespBr.-74, 77). Unlike the plaintiffs in those cases, Wells Fargo is not seeking to "enforce the note." Here, the burden of proof rested with plaintiffs, who waived their right to presentment and to have Wells Fargo seek a judicial foreclosure under the Deed of Trust. If plaintiffs had pleaded and proved that Wells Fargo was not the holder of their Note, they could have pursued an equitable claim for wrongful foreclosure to set aside the sale. But they dismissed Count III (an equitable claim to set aside the Trustee's Deed), and their damages claim fails due to their default.

Besides being wrong, plaintiffs' UCC primer is irrelevant because their Petition did not challenge Wells Fargo's right to enforce the Note (*see* Br.-46-47). Plaintiffs maintain, without citation, that the court "rejected that argument on May 20, 2014" (RespBr.-75). But what the court "rejected" were defendants' objections that plaintiffs' discovery far exceeded their pleadings, reasoning – wrongly – that plaintiffs should be able to propound whatever discovery they chose, and then amend their pleadings based on the results of their fishing expedition (Tr.-8:4-11:1). Despite this gift of unfettered discovery, plaintiffs never amended their Petition to put Wells Fargo's right to enforce at issue. As such, the Judgment must be reversed. *Medve Grp. v. Sombright*, 163 S.W.3d 453, 456 (Mo.App. 2005) (judgment is void if based on issues outside the pleadings).

The reason plaintiffs never amended, of course, is that discovery responses were consistent with their Petition and established that Wells Fargo *was* the holder of the Note. The Trustee's Deed recitals (Ex.-3) are prima facie evidence that Wells Fargo was the legal holder (Br.-48; Ex.-3). §443.380. Given their judicial admissions that the Note was payable to Wells Fargo and that Wells Fargo was the beneficiary of the Deed of Trust, and their acknowledgement that "Wells Fargo is the mortgage holder" (L.F.-17; Ex.-10), this fact is beyond dispute.

The court's sanctions allowed plaintiffs to misrepresent that the Note was unenforceable and "is not endorsed in blank" (Br.-80-82). To justify admitting into evidence an outdated photocopy of the promissory note and asserting that Wells Fargo was not the holder, plaintiffs claim "there was no evidence that Wells Fargo possessed the original instrument signed by Holm, or that the original instrument was properly endorsed" (RespBr.-77). But the record is in fact replete with supporting evidence. Plaintiffs requested in discovery "a color copy of the original endorsed plaintiffs' note dated July 30, 2001" (L.F.-545). Defendants responded, "see attached documents nos. WF071-073" (L.F.-545). When plaintiffs asked to "personally inspect the original note," defendants advised, "the original Note and Mortgage will be physically located in our [counsel's] Fairway Kansas offices starting July 7, 2014" (L.F.-553, 556). Plaintiffs' counsel's sworn declaration stated that "[o]n September 10, 2014 I spent two hours traveling to Kozeny … to inspect the Holm note" (L.F.-345).

On October 14, 2014, plaintiffs subpoenaed Kozeny, stating that "[t]his subpoena and document request concern[] a Note dated July 30, 2001 between [original lender] and Borrowers David and Crystal Holm …. A copy of the Note is attached … as Exhibit 1" (L.F.-201). The attached Note bears the WF071-073 Bates numbers, and is endorsed in blank (L.F.-206-08). Plaintiffs' counsel used the endorsed-in-blank Note as an exhibit at Amber Ott's and Dean Meyer's depositions – referring to it as "my clients' note" – and both witnesses confirmed the existence of the endorsement (S.L.F.-330-31(MeyerTr.-41:9-21, 44:11-45:8); S.L.F.-454-55(OttTr.-183:3-10, 186:5-10)). Amber Ott also confirmed Wells Fargo's possession of the Note through the foreclosure sale (S.L.F.-455(OttTr.-187-89). Those depositions were admitted into evidence (Tr.-511:22-25).

Plaintiffs refer to the note they introduced at trial as "Trial Exhibit 26," tacitly recognizing that it is not a true copy of the Note they executed. "Trial Exhibit 26," they say, "is clearly unenforceable by Wells Fargo or Freddie Mac" (RespBr.-75), which is akin to arguing that a photocopy of an unexecuted contract is unenforceable while the executed version sits in your back pocket. Exhibit 26 exists only because Kozeny sent plaintiffs the unendorsed copy of the Note, explaining that Kozeny was a debt collector, and that "[i]n accordance with applicable law" it was providing a "copy of the note" to "verify the debt." The letter, sent in response to plaintiffs' dispute, fulfilled Kozeny's obligations under 15 U.S.C. §1692g(b), which requires only that a debt collector "correctly identif[y] the original loan and the original lender." *Maynard v. Bryan W. Cannon, P.C.*, 401 F. App'x 389, 396-97 (10th Cir. 2010). Kozeny's letter did precisely that. Indeed, as plaintiffs themselves explain, "[t]he idea is that the paper itself is treated as if it is the claim or debt" (RespBr.-71). Kozeny's letter did not purport to establish Wells Fargo's identity as the current holder – only that the debt existed. Having withheld the actual Note at trial, plaintiffs now erroneously maintain that Wells Fargo failed to carry its burden of establishing that it was the holder. But as the defendant, Wells Fargo had no burden. Rather, it was plaintiffs' burden to establish that Wells Fargo was *not* the holder, and they did not do so.

II. Freddie Mac is entitled to judgment on plaintiffs' quiet-title claim.

Freddie Mac is not contending that wrongful-foreclosure plaintiffs "must choose between monetary damages or quiet title relief" (RespBr.-81), but that they must choose between monetary damages and rescission (Br.-50-51) (citing *Kennon v. Camp*, 353 S.W.2d 693 (Mo. 1962); *Peterson v. Kansas City Life Ins. Co.*, 98 S.W.2d 770 (Mo. 1936)). When plaintiffs dismissed Count III – which sought to set aside the Trustee's Deed – to pursue a damages claim, they forfeited their ability to quiet fee-simple title in their names. That requires proof of superior title, *Ollison v. Village of Climax Springs*, 916 S.W.2d 198, 203 (Mo. 1996), which they were estopped from asserting under *Kennnon* and *Peterson*.

Kennon and *Peterson* control here despite not involving quiet-title claims. They establish that plaintiffs cannot obtain a double recovery – damages *and* unwinding the sale. Plaintiffs cite no contrary authority. *Williams v. Kimes*, 996 S.W.2d 43 (Mo. 1999) (RespBr.-80), is irrelevant. That sale was set aside for failure of notice, but the plaintiffs did not receive damages. Here, plaintiffs chose to be put in their *ex ante* position by seeking damages. Quieting fee-simple title in their favor resulted in an impermissible double recovery.

III. Plaintiffs did not introduce evidence necessary for the proper measurement of damages in a wrongful-foreclosure case.

In citing MAI 4.01 (RespBr.-83), plaintiffs ignore that it limits compensation to "any damages … sustained *as a direct result* of the occurrence" at issue (emphasis added). The measure of damages available in wrongful foreclosure – the property's fair-market value less the lien amount on the foreclosure-sale date, *see Edwards v. Smith*, 322 S.W.2d 770, 777 (Mo. 1959) (Br.-50, 52) – properly recognizes principles of causation. Foreclosure is a legal transaction that results in a change in ownership. When a foreclosure occurs under circumstances giving rise to a claim, the mortgagor stands to lose any equity in the property. The measure of damages established in *Edwards* compensates the mortgagor for any lost equity.

Edwards and *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970), do not support plaintiffs' excessive damage award. *Edwards* states that foreclosure actions are not distinct from other damage actions in the “measure of damages” (RespBr.-83) by way of explaining that attorney fees are no more recoverable in wrongful-foreclosure cases than in other damage actions. 322 S.W.2d at 777. The opinion’s next sentence makes clear that lost equity is the proper measure of damages for wrongful foreclosure. *Id.*

Bower highlights why a “before and after” measurement is *not* appropriate here. The opinion graphically describes the noxious effects of defendants’ hog-farm operations on the plaintiffs’ neighboring premises, and states that the measure of damages for permanent nuisance is the depreciation in property value. 461 S.W.2d at 798, 803. In contrast, the foreclosure sale had no physical effect on plaintiffs’ property and did not diminish its value. They assert that “the value of the property declined from 2008 to the date of trial” and pronounce that supposed decline “the natural and foreseeable consequence of the wrongful foreclosure” (RespBr.-84-85), but offer no explanation how the change in ownership caused the supposed decline. Plaintiffs’ attempt to turn the measure of damages in a permanent-nuisance case into a universal standard for all torts “involving land” again ignores the required causal connection between a defendant’s conduct and the damages recovered.

Plaintiffs’ effort to distinguish defendants’ cases fails. The defendants-mortgagors in *Adkison v. Hannah*, 475 S.W.2d 39, 40 (Mo. 1972), alleged in a counterclaim that the plaintiffs-mortgagees conspired to destroy their business so that the plaintiffs could regain the property through foreclosure. The Court stated, “[a]ssuming that the ultimate object of the conspiracy was to force the defendants into default …, the measure of damages for wrongful foreclosure” is the difference between the fair-market value and the liens. *Id.* at 43 (quoting *Edwards*, 322 S.W.2d at 777). The Court thus acknowledged the standard for wrongful-foreclosure damages under settled Missouri law.

Plaintiffs maintain that even if the proper "measure of damages is the value of the property in excess of the debt," they "still suffered substantial economic loss" from the foreclosure (RespBr.-85-86). They argue for the first time that "because neither Wells Fargo nor Freddie Mac had a right to enforce the debt," they are entitled to the property's value at foreclosure, $141,762.30, in addition to emotional-distress damages (RespBr.-85-86).

Plaintiffs' new damage theory is faulty for at least three reasons. First, defendants *did* have the right to enforce the Note (*see* Point I, *ante*). Second, plaintiffs have never denied signing the Note; even in their fictional scenario, the original lender, Commercial Federal, would be entitled to enforce it. Plaintiffs cannot wipe away their debt. And third, the trial court's award adopted plaintiffs' unsustainable damages theory. Plaintiffs did not appeal from the Judgment, and are precluded from claiming even greater damages on appeal.

IV. Plaintiffs' failure to plead special damages requires reversal of their actual-damage award.

Wells Fargo explained that in a wrongful-foreclosure action, any damages other than lost equity constitute special damages, which "must be specifically pleaded" (Br.-52-54, citing Rule 55.19; §509.200). Plaintiffs assert that they were not required to plead special damages because they alleged that "defendants' conduct was 'intentional, knowing, willful, malicious and outrageous'" (RespBr.-80). According to plaintiffs, "[w]hen malice and willfulness are alleged, emotional distress is understood to be a natural consequence of the underlying wrong" (RespBr.-80).[2/]

The cases plaintiffs cite do not excuse compliance with Rule 55.19 for a claim of emotional distress when the plaintiff has pleaded malice. This Court stated in *Fetick v. American Cyanamid Co.*, 38 S.W.3d 415, 419 (Mo. 2001), that mental suffering is not compensable in a fraud case without physical injury "unless the tortfeasor acted willfully or maliciously." The Court cited *Medlock v. Farmers State Bank*, 696 S.W.2d 873, 880 (Mo.App. 1985), which likewise stated, in dicta, that emotional distress is not compensable in an *attempted* wrongful-foreclosure claim *unless* the purported wrongdoing occurred "under circumstances of malice [and] wilfulness." In other words, the defendant's culpable mental state is a threshold requirement for recovery for emotional distress. Neither case addressed a Rule 55.19 challenge, and neither excuses the pleading of emotional distress as special damages.

The bare allegation that defendants acted with malice should not relieve plaintiffs of the obligation to provide the notice Rule 55.19 requires, which ensures defendants the full opportunity during discovery to adequately test allegations of distress. That is especially true here, where plaintiffs did not prove their claim of malice at trial, and the conduct they allege supported their punitive-damages claim – Wells Fargo's failure to abide by Freddie Mac's servicing agreement, its desire to recoup fees at foreclosure, and

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[2/] Plaintiffs do not argue that post-foreclosure diminution in property value or repair costs could be considered "natural consequences" of the foreclosure.

the lack of a corporate representative at trial – cannot have caused them emotional distress.

V. Plaintiffs did not establish that their alleged emotional distress was medically diagnosable and medically significant.

As plaintiffs concede, they were required to demonstrate that their purported distress was medically diagnosable and medically significant (RespBr.-78) (citing *Bass v. Nooney Co.* 646 S.W.2d 765 (Mo. 1983)). Plaintiffs have no answer for the cases holding that medical testimony is required to prove that distress is medically diagnosable and medically significant (Br.-57). Instead they maintain that their own testimony sufficed, but the cases they cite are off the mark (RespBr.-78). The courts in *Fust v. Francois*, 913 S.W.2d 38, 48 (Mo.App. 1995), and *Lipari v. Volume Shoe Corp.*, 664 S.W.2d 953 (Mo.App. 1983), held that medical testimony was not required to support the plaintiffs' emotional-distress claims in malicious-prosecution actions. *Lipari* does not mention *Bass,* which was decided earlier the same year. In *Fust*, the court cited an earlier decision holding that *Bass* does not apply to intentional torts. 913 S.W.2d at 48.

Fust and *Lipari* are inapposite because wrongful foreclosure has no scienter element and is not an intentional tort.[3/] Plaintiffs cite no case suggesting that the

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[3/] This Court noted the holdings of *Fust* and *Lipari* in *State ex rel. Dean v. Cunningham,* 182 S.W.3d 561, 568 (Mo. 2006), but has never held that *Bass* does not apply to intentional torts. Indeed, in *Fetick*, this Court held that "emotional distress, to be medically-diagnosable and medically-significant requirements can be satisfied without expert testimony, let alone on the plaintiff's own say-so. *See Cunningham*, 182 S.W.3d at 568 (noting "the necessity for medical proof" to establish a claim of mental distress under *Bass*). Moreover, plaintiffs do not address the deficiencies in their testimony (Br.-57-58).

According to plaintiffs, Wells Fargo "ignores the history of emotional distress damages in wrongful foreclosure cases as a necessary and natural consequence of the tortious conduct" (RespBr.-60). But no such "history" exists – neither case they cite affirmed an award of emotional-distress damages for wrongful foreclosure. *Medlock* held that emotional-distress damages were not recoverable on an attempted wrongful-foreclosure claim. 696 S.W.2d at 880-81. *Dobson v. Mortgage Electronic Registration Systems, Inc./GMAC Mortgage Corp.*, 259 S.W.3d 19, 21-22 (Mo.App. 2008) involved a default judgment, reversed outright on appeal.

Finally, plaintiffs' response to Wells Fargo's argument that their claim for post-foreclosure repairs to the property lacked the required causal connection to the foreclosure (Br.-58-59) is baffling. They seem to suggest that "but for" the foreclosure, the property either would not have needed repairs or plaintiffs would not have made repairs (RespBr.-85). Again, foreclosure results in a change in legal ownership; it cannot have caused the property's condition to deteriorate.

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compensable as damages for willful fraud, must be medically diagnosable and significant." 38 S.W.3d at 419.

VI. Wells Fargo was entitled to a jury trial.

Plaintiffs do not disagree that the reasons the court gave for denying Wells Fargo's jury-trial request are not among §510.190.2's "exclusive" methods by which a party may be deemed to have waived a jury trial. *See* Br.-61-63. Instead, plaintiffs raise different grounds that likewise do not vindicate the denial of Wells Fargo's constitutional and statutory right to a jury trial (RespBr.-55-63).

First, plaintiffs suggest that denying Wells Fargo's inviolate right was acceptable because "[t]he scope of the trial was narrow," in that the striking of defendants' pleadings was in effect a finding of liability, and the sanctions precluded Wells Fargo from participating in the trial on damages (RespBr.-56). But as shown in Point I, plaintiffs' own evidence established that the finding of liability was improper. Moreover, Wells Fargo was entitled to have a jury determine punitive liability and the amount of any actual and punitive damages. "Missouri law long has recognized that one of the jury's primary functions is to determine the plaintiff's damages." *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 639 (Mo. 2012).

Second, plaintiffs suggest that the court's sanctions "rendered the case uncontested," and that "the natural and logical extension of the punishment is to lose the right to a jury trial" (RespBr.-56-57). Plaintiffs' cases do not support their conclusion. *Eidson ex rel. Webster v. Eidson*, 7 S.W.3d 495 (Mo.App. 1999), and *Karolat v. Karolat*, 151 S.W.3d 852 (Mo.App. 2004), are family-law cases; there would have been no jury even if the defendant spouses' pleadings hadn't been struck. Even though the trial court struck the defendants' pleadings in *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014), and treated it as a default, a jury still determined damages and punitive liability. In *Davis v. Chatter, Inc.*, 270 S.W.3d 471, 474 (Mo.App. 2008), the trial court struck the defendants' pleadings and entered default judgment for the plaintiffs. The defendants did not raise the denial of their right to jury trial on appeal, nor does the opinion indicate that they asked for a jury. Finally, plaintiffs' reliance on *Scott v. LeClercq*, 136 S.W.3d 183 (Mo.App. 2004), is grossly misplaced. There, the defaulted defendant did not allege error in the denial of his right to jury trial until his reply brief, and he therefore had not preserved the issue. *Id.* at 193.

Plaintiffs' unsupported argument that the loss of an inviolate constitutional right is the "natural and logical extension" of discovery sanctions cannot be squared with *Lewellen* or *Watts*. If a statutory damages cap "amounts to an impermissible legislative alteration of the Constitution," *Watts*, 376 S.W.3d at 642, so too would interpreting Rule 61.01 as granting trial courts discretion to negate the inviolate right to have a jury determine liability and damages. A trial court has no greater authority than the legislature to encroach on the constitutionally-guaranteed right.

Third, plaintiffs accuse Wells Fargo of "ignor[ing]" that "a party may contractually waive its right to a jury trial" (RespBr.-58). But Wells Fargo had no reason to address contractual waiver. The court did not deny Wells Fargo's jury-trial request based on contractual waiver, plaintiffs did not argue contractual waiver at trial, and Wells Fargo did not contractually waive its inviolate right.

Plaintiffs' argument to the contrary is thoroughly flawed. For starters, plaintiffs' unsupported statement that contractual jury waivers "are common in agreements involving the sale of home mortgage loans" (RespBr.-58, 60) is irrelevant: their claims have nothing to do with the sale of a mortgage loan. Plaintiffs speculate that a "Tri-Party Agreement," which Meyer referenced at his December 19, 2014 deposition, "may well [have] contain[ed]" a jury waiver because, they submit, such waivers are "typical" (RespBr.-60). Plaintiffs never requested the tri-party agreement in discovery. Instead, after Meyer referenced a tri-party agreement between Commercial Federal, Freddie Mac, and the servicer (not Wells Fargo) in effect in 2005 (S.L.F.-359 (MeyerTr.-158-60)), plaintiffs asked the Special Master to order defendants to produce that agreement. The Master complied, ordering on December 29, 2014, that defendants produce the agreement by noon on January 2, 2015 (L.F.-301).

Plaintiffs assert that this Court should assume from the non-production of the agreement that defendants spoliated it and infer that it contained a jury waiver (RespBr.-42-43). But no evidence exists Wells Fargo intentionally destroyed the agreement, much less under circumstances indicating fraud, deceit or bad faith, as is required to invoke the spoliation doctrine. *Wilmes v. Consumers Oil Co.*, 473 S.W.3d 705, 719 (Mo.App. 2015). Meyer testified that the agreement had not been "in use since 2005 when the servicing transferred to Wells Fargo," and may have been destroyed under Freddie Mac's document retention policy (S.L.F.-512-13 (MeyerTr.-246-48)).

Plaintiffs fail to explain how they could invoke an agreement that three non-parties made to mutually waive their rights to a jury trial. *See, e.g., Pancakes of Hawaii, Inc. v. Pomare Props. Corp.*, 944 P.2d 97, 103 (Haw. App. 1997) ("a stranger to the contract" containing a jury waiver "cannot use that waiver to shield himself or herself from a jury trial"). Nor do plaintiffs explain how a jury waiver – assuming one exists – in the tri-party agreement could possibly bind non-party Wells Fargo. *See Popular Leasing USA, Inc. v. Terra Excavating, Inc.*, 2005 WL 2468069, *4 (E.D.Mo. 2005) ("Generally," a contractual jury waiver "affects only the rights of the parties to that contract ….") (citation omitted). Moreover, plaintiffs' wrongful-foreclosure action cannot plausibly be described as arising from the tri-party agreement. *See Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. 1997) ("businesses and individuals should have the ability to agree to waive a jury *if a lawsuit arises from their contract*") (emphasis added). Wells Fargo plainly did not contractually waive its constitutional right.

Plaintiffs' third reason for affirming the denial of Wells Fargo's jury request is that Wells Fargo "never actually desired a trial by jury," but wanted only to "put up roadblocks and forestall justice" (RespBr.-62). Plaintiffs base this risible argument on Wells Fargo's failure to file the proposed jury instructions it gave to the court, and the trial court's perception that counsel "feigned … surprise" when a jury was not present when trial began. A failure to file jury instructions is not listed in §510.190.2 as a means of waiver (*see* Br.-61), and plaintiffs cite no contrary authority. Their suggestion that a litigant's right to invoke its inviolate guarantee hinges on the court's assessment of its counsel's sincerity is, unsurprisingly, also unsupported.

In sum, plaintiffs' belated and contrived arguments fail to excuse the denial of Wells Fargo's inviolate right.

VII. The sanctions award should be reversed.

In defending the extreme sanctions imposed here, plaintiffs do not disagree with any of defendants' cited authorities or the common-sense principle that a trial court should "tailor its remedy to the harm it perceive[s]." *Hancock v. Shook*, 100 S.W.3d 786, 798 (Mo. 2003). In fact, plaintiffs agree that "courts must impose *appropriate* sanctions for discovery rule violations" (RespBr.-35) (emphasis added). The court here erred by imposing severe sanctions that were disproportionate to the minimal prejudice – if any – suffered by plaintiffs (Br.-65-68).

To defend the sanctions order, plaintiffs rely on courts' discretion *whether* to impose sanctions. Rule 61.01(d), however, requires that sanctions be "just," confirming that broader discretion is afforded to a court's threshold determination whether to impose sanctions than to its selection of an appropriate sanction. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (recognizing due process limitations on selecting sanctions). Otherwise, courts could enter "death penalty" sanctions for any minor discovery infraction.

Plaintiffs cite no authority conferring unfettered discretion on trial courts in selecting discovery sanctions. Their reliance on *Lewellen* is misplaced. The defendants there challenged not the imposition of sanctions but "the vagueness of the sanctions imposed." 441 S.W.3d at 149 n.18. The court had entered sanctions because the defendants had refused to appear for depositions – not because depositions were delayed or rescheduled. The prejudice was palpable because plaintiffs could not obtain discoverable information from their adversaries in advance of trial. Even so, in contrast to defendants here, the *Lewellen* defendants received a jury trial on damages and punitive liability, participated in voir dire, and cross-examined witnesses regarding damages. *Id.* at 149-50.

Plaintiffs do not deny that prejudice factors heavily in the sanctions analysis (*see* Br.-66, 76-79), but they try to skirt the issue by erroneously claiming that defendants have not preserved it for appellate review (Resp.Br.-38). The discovery disputes did not prejudice plaintiffs because their discovery requests far exceeded the issues framed by their Petition and because they haven't pointed to any pertinent document they did not receive. The court rejected defendants' objections based on scope at the first discovery hearing (Tr.-8:20-12:7), and both plaintiffs' counsel and the court considered defendants foreclosed from making further objections to the scope of plaintiffs' discovery (Tr.-32:21-33:13, 34:10-25, 35:19-24, 59:1-7). Although they were not required to, *see* Rule 78.07(b), defendants filed post-trial motions, with suggestions, to provide the court with the opportunity to correct its mistakes. Defendants' motions squarely raised the lack of prejudice to plaintiffs (L.F.-462-63; S.L.F.-574-77).

Plaintiffs do not come close to demonstrating that any of the discovery disputes affected their ability to prove their claims, let alone prejudice that would justify sanctions of the severity imposed here.[4/] In fact, by conceding they were not third-party

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[4/] Plaintiffs wrongly contend that some requests "had been outstanding for more than one year" (RespBr.-36). Defendants timely objected to plaintiffs' first set of discovery requests, and the court did not overrule those objections until May 2014 (Tr.-7-13).

beneficiaries of the servicing agreement and had no enforceable rights under it (RespBr.-50), plaintiffs now contradict their central argument in support of sanctions (L.F.100-01 ("The servicing agreement is a critical document because it contains information about the authority of Wells Fargo to act on behalf of Freddie Mac"); Tr.-102:4-105:5). Plaintiffs maintain that the servicing agreement provides "guidance" to servicers and evidences Freddie Mac's "preference" for reinstatement (RespBr.-50). But failing to obtain non-actionable "guidance" could not have affected plaintiffs' ability to establish Wells Fargo's liability for wrongful foreclosure, which turned only on whether Wells Fargo had the right to foreclose under the documents that governed plaintiffs' mortgage – the Note and Deed of Trust. In any event, in attempting to show the agreement's relevance, plaintiffs unwittingly disprove their claim of prejudice – they cite *sections of the agreement that they introduced at trial* (RespBr.-50 (citing "L.F." rather than "Supp'l L.F."). How can they have been prejudiced when defendants produced the agreement and plaintiffs admitted it at trial (Exs.-27, 28, 49, and 55; S.L.F.-126-37, 154-313)?

Plaintiffs also contend that the "guidance" was relevant to punitive damages (RespBr.-61). Freddie Mac's non-actionable "guidance" is equally irrelevant to Wells Fargo's punitive liability (Br.-87). But even if the agreement had any potential bearing on punitive damages, prohibiting defendants from defending themselves on liability or damages based upon plaintiffs' belated receipt of portions of a document relevant only to punitive damages would still be an abuse of discretion.

Plaintiffs are no more successful in showing prejudice in connection with their other discovery requests. The irrelevance of the tri-party agreement, which plaintiffs never requested in discovery, is discussed in Point VI, *ante.* Defendants produced a call log showing all "communications between Holm and Wells Fargo in August 2008" (L.F.-888; S.L.F.-415(OttTr.-28)). That plaintiffs did not introduce the log at trial is telling. Plaintiffs have not identified any communication that was not produced.

Plaintiffs complain that checks Wells Fargo issued "for corporate advances and other expenses to third parties" were not produced (RespBr.-38), but many were produced on January 5 or did not exist (Tr.-128:11-18). Defendants' response to No. 6 was likewise produced January 5 (Tr.-124:1-4). In any event, plaintiffs were in default because their last monthly payment was in February 2008 (Br.-41-42). Whether they were overcharged a particular fee would not change the fact of their default, but could only have "contribut[ed]" to the magnitude of the default (RespBr.-38). Plaintiffs do not explain how these expenses affected the merits of their wrongful-foreclosure claim, but suggest only that they might have been used in some unidentified capacity in trial preparation or at trial – scant justification for the severe sanctions.

Nor did the disputes over defendants' depositions prejudice plaintiffs. Freddie Mac did not simply "fail[] to appear" for deposition on December 2, 2014 (RespBr.-51); plaintiffs knew beforehand of Freddie Mac's position that its corporate representative could attend by telephone under Rule 57.03(b) (Br.-14, 72-73; Tr.-46:13-24). In any event, Dean Meyer was deposed 17 days later, and plaintiffs offered his deposition testimony into evidence at trial. Plaintiffs fail to explain why they rejected Wells Fargo's offer to produce Amber Ott on January 8 when their subsequent offer to make their expert available that date demonstrates their availability (Br.-73; *compare* Tr.-134:10-

135:11 *with* Tr.-167:1-4, 168:1-10). Their failure to pursue an alternative date demonstrates that the episode had more value as fodder for their sanctions motion than the limited scope of a second Ott deposition would have provided.

Plaintiffs fault defendants for failing to comply with the Master's direction to produce documents within four days, two of which were New Year's Eve and New Year's Day. Although the Master's unworkable January 2 deadline was not met, plaintiffs received 913 pages of documents the following Monday, January 5 (Tr.-110:7-15). To impose sanctions based upon defendant's belated compliance with the Master's unrealistic deadline would eliminate plaintiffs' burden to show actual prejudice and would disregard the limitations on the Master's authority under Rule 68.01. *See Transit Cas. Co. in Receivership v. Certain Underwriters at Lloyd's of London*, 995 S.W.2d 32, 34 (Mo.App. 1999) (a trial court may not "delegate its decision-making power to the master, nor is the master authorized to issue orders finally disposing of matters referred to him or her").

Plaintiffs have not shown that defendants' discovery conduct was in any way contumacious. Although some sections of the 2008 version of the servicing agreement were not on the CD defendants produced in November 2014 (*see* Br.69-70), there is no evidence indicating their omission was anything other than inadvertent. The 2008 version did not vary substantially in any relevant way from the online version (S.L.F.-359-60, 513), and plaintiffs have not suggested any possible motive for defendants to mislead plaintiffs about the agreement – which, again, was introduced at trial in both its website and 2008 versions.

Defendants demonstrated that the severe sanctions imposed here allowed plaintiffs to turn the trial—which should have been a search for truth – into a farce by admitting the unendorsed note and arguing that Wells Fargo had no right to collect their mortgage payments, let alone to foreclose (Br.-80-82). In response, plaintiffs are predictably unrepentant: "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" (RespBr.-87). That plaintiffs treated trial like an unrefereed rugby scrimmage underscores the danger of excessive sanctions and the need for proportionality in the selection of sanctions. Affirming the indefensible result here would only encourage litigants to engage in aggressive discovery tactics in hopes of parlaying any perceived deficiency in their opponent's response into sanctions and the lottery-like damages here.

For these reasons, the sanctions order exceeded the court's discretion to enter sanctions orders that are "just." The court should not have deprived defendants of their right to defend themselves based on discovery disputes that did not impair their ability to prove their claims. Because the court relegated defendants to spectator status at trial, its $3,000,000-plus Judgment was in effect an additional and grossly excessive sanction. Any prejudice to plaintiffs was amply remedied by the $30,000 attorney's-fee award, and defendants were further punished by having to foot the Master's $16,077.30 bill (L.F.-798). The remaining sanctions should be reversed.

VIII. The punitive-damage award cannot stand.

Plaintiffs' Section VII, which lumps together their responses to Wells Fargo's three Points (VIII-X) on punitive damages, is most notable for what they do not address. Aside from a half-hearted contention that the statutory punitive-damages cap does not apply here, plaintiffs do not confront Wells Fargo's arguments at all. Plaintiffs do not mention, let alone refute, Wells Fargo's due-process argument (Point IX, Br.-92-93), tacitly conceding that punitive damages may not be awarded against a defendant that has been confined to the sidelines during trial.

A. This is not a punitive damages case.

Plaintiffs do not counter or even acknowledge Wells Fargo's dismantling of the court's four reasons for imposing punitive liability (Br.-86-91). Instead, without discussing the applicable standard or citing a single case, and with few record citations, plaintiffs simply paraphrase the Judgment (*compare* RespBr.-87-90 *with* Appellants' Substitute Appendix-A6-8). Like the court, plaintiffs identify no facts that show the culpable mental state required to levy punitive damages on Wells Fargo.

Notably, while plaintiffs understandably do not mention Ott's innocuous testimony that she was testifying in a representative capacity, they substitute an equally flimsy basis for concluding that "Wells Fargo has shown no remorse": it had no "corporate representative at trial" (RespBr.-90). Having no representative at a bench trial in which defendants were not allowed to participate hardly reflects evil motive or reckless indifference. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423

(2003) ("A defendant should be punished for the conduct that harmed the plaintiff …."); *Vaughn v. North Am. Sys., Inc.*, 869 S.W.2d 757, 759 (Mo. 1994).

B. Section 510.265.1 applies.

Plaintiffs assert that Wells Fargo did not preserve its argument that §510.265.1's punitive-damage cap applies because it did not object to their preposterous request for $16.7 million in punitive damages, and defendants' proposed order (filed pre-judgment) did not ask the court to consider the cap (RespBr.-87). But §510.265.1 comes into play *after* judgment is entered; only then can it be determined whether the punitive-damage award exceeds $500,000 or "[f]ive times the net amount of the [actual-damage] judgment awarded to the plaintiff." Wells Fargo timely sought amendment of the judgment to conform to §510.265.1 (L.F.-458, 471, 476). Plaintiffs cite no case requiring a preemptive objection to the amount of punitive damages a plaintiff requests. *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 174 (Mo.App. 2012), which addresses the failure to timely object to jury instructions, is inapposite.

Alternatively, plaintiffs assert that *Lewellen* "controls application of §510.265.1" (RespBr.-87). But *Lewellen* held §510.265.1 unconstitutional to the extent it infringed on the plaintiff's constitutional right to jury trial. 441 S.W.3d at 145. Here, plaintiffs chose to *forgo* a jury.

Plaintiffs further claim that in electing a bench trial, they cannot have waived "their right to uncapped punitive damages" without infringing their "constitutional right of access to courts" (RespBr.-87). Plaintiffs' two-sentence argument hardly suffices to meet their burden of proving §510.265.1 "clearly and undoubtedly violates" a constitutional provision. *See Franklin Cnty. ex rel. Parks v. Franklin Cnty. Comm'n*, 269 S.W.3d 26, 29 (Mo. 2008). Moreover, plaintiffs have no "right" to punitive damages, capped or uncapped. They cite *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000), without explaining its import here. Applying §510.265.1's statutory cap to plaintiffs' excessive punitive-damages award does not equate to barring them from "accessing our courts in order to enforce recognized causes of action for personal injury." *Id.* at 549 (internal quotation omitted). Plaintiffs faced no "'arbitrary or unreasonable'" barrier to their access to court, *id.* at 553-54, but, again, *chose* a bench trial.

C. The award is constitutionally excessive.

If the Court does not reverse the punitive-damage award outright or grant a new trial, the award must be reduced even further than §510.265.1 requires so as not to exceed the limits of due process. Applying the guideposts established in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-585 (1996), Wells Fargo demonstrated that no award exceeding a 1-to-1 ratio with compensatory damages could comport with due process (Br.-96-100).

Plaintiffs offer no contrary analysis of the guideposts, and indeed their *only* comment on excessiveness is their bare statement that the punitive-damages award "was well within the acceptable ratio in Missouri" (RespBr.-90). Plaintiffs' implicit suggestion that Missouri law allows for a greater ratio between compensatory- and punitive-damage awards than United States Supreme Court precedent does is off-base. The Supreme Court's pronouncements on the limits of due process are binding on federal and state courts alike. Moreover, whether a ratio is "acceptable" requires an analysis of where the defendant's conduct falls on the spectrum of reprehensibility; here, Wells Fargo's conduct does not meet any of the indicia of reprehensibility (*see* Br.-96-98). In *Lewellen*, this Court justified a double-digit ratio by characterizing Lewellen's $25,000 compensatory award as "small," and labeling the defendants' conduct as "particularly egregious." 441 S.W.3d at 147-48. Neither justification exists here.

Respectfully submitted,

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December 5, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Substitute Reply Brief for Appellants complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 7,744 words, excluding the cover, this certificate, the certificate of service, and the signature block, as determined by the Microsoft Word 2010 Word-counting system.

/s/ *Elizabeth C. Carver*

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2016, I electronically filed the foregoing Substitute Reply Brief for Appellants with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

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