

## Appeals court affirms most of wrongful foreclosure award

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A state appeals court on Tuesday upheld most of a record judgment in a wrongful foreclosure case, though it said the plaintiffs cannot keep the title to the property.

Early last year, a Clinton County judge awarded David and Crystal Holm more than \$3.25 million after they alleged that Wells Fargo bank sold their home at a foreclosure sale despite having previously agreed to let the couple reinstate their loan. After concluding that the defendants had willfully failed to comply with discovery orders, Judge R. Brent Elliott had barred the defense from presenting evidence during the two-day bench trial.

The Court of Appeals Western District on Tuesday upheld that hefty sanction, as well as an award of \$200,000 in emotional damages and \$2.96 million in punitive damages against Wells Fargo.

However, the court canceled an award of about \$95,000 in compensatory damages, saying the couple couldn't recover for the alleged lost property value and repairs made after the foreclosure. The court also said that, under the facts of the case, the plaintiff could seek either damages or the title to the property, but not both. The ruling returns the title to the Federal Home Loan Mortgage Corporation, better known as Freddie Mac.

Despite those reversals, the Holms' attorney, Gregory Leyh, a solo practitioner in Gladstone, said the case remains a victory and that he won't ask for rehearing.

"It says that Missouri homeowners will be protected from outrageous and deliberate harm perpetrated on them by big banks who disregard their interests," Leyh said.

Leyh said the Holms are still living in the home. Although they no longer have title to the property, that doesn't necessarily mean they would have to move out. Leyh said issues with the ownership will have to be addressed later.

Wells Fargo was represented on appeal by attorneys from Bryan Cave. A message left with attorney Elizabeth C. Carver in the firm's St. Louis office wasn't immediately returned.

According to the opinion, the Holms fell behind on their mortgage payments following a dispute over insurance proceeds to cover damages from a storm in 2008. After several weeks of fruitlessly trying to negotiate with someone at the bank or the trustee law firm, Kozeny & McCubbin, David Holm reached a bank representative the evening before the foreclosure sale and was told he could make a payment to reinstate the mortgage.

Holm sent a cashier's check for \$10,306, but the sale proceeded anyway. The bank later said the check arrived too late and that it was in the wrong amount. The appeals court said Elliott had been correct in awarding punitive damages under the circumstances.

"The trial court was left to conclude one of two things. Either Wells Fargo willfully proceeded with the foreclosure sale despite agreeing to postpone the sale, or Wells Fargo willfully refused to correct its mistake in proceeding with the scheduled sale," Judge Cynthia Martin wrote. "In either case, Wells Fargo's conduct was sufficiently reprehensible to warrant an award of punitive damages in the amount of \$2,959,123."

Although the punitive damages were nearly 15 times as large as the compensatory damages, the Western District said such a ratio was acceptable given the bank's "particularly egregious" conduct.

During the Holms' wrongful foreclosure lawsuit, the trial judge found that Kozeny lawyers repeatedly refused to turn over discoverable items and had misrepresented facts in court, causing him to throw out their defense to the case. The Western District, which recounted the discovery problems over eight pages in Tuesday's opinion, said it had "no quarrel whatsoever" with the sanction.

"Two courts have said it can't be tolerated, the way lawyers defend these foreclosure cases," Leyh said.

The bank argued on appeal that its constitutional right to a jury trial had been violated. The Western District, however, said the trial judge's ruling essentially reduced the matter to an uncontested case, similar to a default judgment.

"We conclude as a matter of first impression that in such a case, although the non-offending party has the right to

insist that the uncontested case proceed to trial before a jury, the offending party has no right to insist that the uncontested case be tried to a jury," Martin wrote. Judges Lisa White Hardwick and Gary Witt concurred.

The case is Holm v. Wells Fargo Home Mortgage Inc., WD78666.

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