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COURT OF APPEALS

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APPELLANTS

BY JW

No. **34136-1-II**

**COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON**

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**LEVIUS I. DAVIS and DEBBIE L. VIDAL DAVIS,**  
Husband and Wife,

Appellants,

v.

**WELLS FARGO HOME MORTGAGE COMPANY,**

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
HONORABLE THOMAS FELNAGLE

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**APPELLANTS' REPLY BRIEF**

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*JOHN W. HATHAWAY, PLLC*  
John W. Hathaway, WSBN 8443  
Attorney for Appellants

4600 Columbia Center  
701 Fifth Avenue  
Seattle, Washington 98104  
206/624-7100

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## I. SUMMARY OF REPLY

Wells Fargo attempts to blame the borrowers for not discovering on their own that Wells Fargo had been overcharging them since March 1999 for tax assessments to their escrow account, ignoring its own misrepresentations to the Davises and its concealment of the fact that it was charging them for two tax lots.

Wells Fargo claims for the first time on appeal that the Davises waived all their claims by signing the August 2002 loan modification agreement. The judgment below precludes Wells Fargo from claiming an accord and satisfaction. Moreover, the modification contains no language settling claims and no new consideration for the Davises.

Wells Fargo cannot claim surprise at the Davises' damages because the Davises served interrogatory answers and filed several declarations setting out these damages in response to Wells Fargo's three summary judgment motions. They also filed a formal Statement of Damages, with exhibits, before trial. The Davises' documentation included a large number of medical records gathered as trial exhibits. Finally, Wells Fargo never pursued discovery of the Davises' consequential damages after entry of summary judgment dismissing their tort claims.

Wells Fargo should not be heard to complain of discovery violations in any event, after forcing plaintiffs to move for an order compelling discovery, then resisting the discovery ordered. Wells Fargo's discovery intransigence forced plaintiffs' attorney to take depositions of four Wells Fargo trial witnesses the week before trial and file a Motion in Limine because of critical documents that Wells Fargo withheld.

Moreover, the trial court did not base its decision excluding damages on

discovery violations, in any event. The court relied entirely upon its own view of proximate cause, preempting the function of the jury.

Wells Fargo cannot rely on surprise, undue delay or undue prejudice to justify denying the Davises' Motion to Amend Complaint to add the misrepresentation and CPA claims because the claims were already stated in the Complaint and Wells Fargo failed to advise the court of any facts evidencing prejudice from adding the claims three months before trial.

Wells Fargo's claim that the trial date had already been postponed is disingenuous. Wells Fargo demanded that the Davises substitute the standard case schedule for the expedited schedule because of the Davises' personal injury claims. And the standard schedule did not set a delayed date for the trial: The trial was set for just 12 ½ months after Wells Fargo filed its Answer. Wells Fargo did not state any discovery that the new claims would require and three months was ample time to complete any discovery.

In an effort to manufacture facts to bring the contract within the Economic Loss Rule, Wells Fargo misstates the Deed of Trust terms and misrepresents the law under RESPA and FCRA. The Deed of Trust contains no language limiting Wells Fargo's liability for negligence or CPA violations or disclaiming its liability for negligently servicing the escrow. The FCRA does not preempt the Davises state claims as a matter of law. And the section of RESPA that prohibits Wells Fargo from collecting excessive escrow amounts confers no private cause of action on consumers harmed by such practices. Consumers may pursue their state law remedies.

Wells Fargo's legal analysis of damages awardable for misrepresentation is

also contrary to law. The measure of damages from misrepresentations causing personal damage (rather than diminishing the value of a sale) is all damages proximately caused by the misrepresentation. Washington has long recognized emotional distress damages for misrepresentations that damage property interests, such as one's home, reputation and credit. Washington has held specifically that damage to one's credit supports an award of damages for mental and emotional distress.

The trial court erred in refusing to allow the Davises to introduce evidence supporting damages from the forced sale of their cars and loss of G. I. benefits. Wells Fargo's objections all come down to proximate cause, which must be determined by the jury from the evidence, not by the judge before the evidence is admitted. The court erred in excluding damage to the Davises' reputation and creditworthiness because Washington has held the plaintiffs' testimony is sufficient to establish such damages. Wells Fargo's brief does not respond to any of the trial court's errors in excluding attorneys fees identified in Appellants' Brief. The Court must reject Wells Fargo's argument that time was wasted on "massive damage theories" and that this case presented "unique circumstances" because Wells Fargo did not identify any attorney time devoted to pursuing massive damages, nor any unique circumstances justifying the trial court in excluding half of the fees requested.

The "double the damages" method for setting fees that Wells Fargo urges on the Court is inconsistent with the lodestar method, which requires that the court examine the actual work and allow reasonable fees. Even a cursory examination of defendant's pretrial motions and motions in limine, the 72 complex trial exhibits, and number of defense attorneys working this case demonstrates that Wells Fargo's

actions defending this case are at odds with the trial court's belief that the parties should have economized on attorney time. No one experienced in litigation could reasonably conclude from examining the court files that a reasonable fee for prosecuting plaintiffs' claims from the complaint through post trial fee motions is \$48,000.00. This court should hold that the trial court erred in its fee calculations and increase the award as requested in Appellants' Brief.

## II. REPLY TO COUNTERSTATEMENT OF FACTS

### A. **Wells Fargo Negligently Overcharged the Davises for Tax Advances into Escrow From the Outset, and Persisted in Those Overcharges, Despite the Davises' Complaints And the Simple Investigation Required to Rectify the Error.** (Rsp. Brf., III. A.)

Wells Fargo's suggestion that it "inherited" errors calculating the Davises' property tax obligation is inaccurate. Rsp. Brf. At 6-7. Wells Fargo was the first servicer to begin collecting double tax payment. CommUnity Lending transferred the Davises' mortgage to Norwest Mortgage on July 29, 1998, just eight days after the Davises closed their home loan. Ex. 11, 12 , 13. Norwest never collected any improper payments from the Davises. Wells Fargo made the first improper tax payment (\$381.17) on March 15, 1999. CP 1013, 1168. Wells Fargo increased the Davises' monthly escrow assessment in July 1999 by \$42.00 and again in November 1999, by \$482.00. CP 383.

Wells Fargo ignored the Davises' complaints in the Fall of 1999 and misrepresented to the Davises the reasons for the increases and continued wrongfully over-assessing escrow payments from the Davises for almost 3 more years, despite the fact that Wells Fargo could verify the Davises' tax obligation with Pierce County

simply by making a phone call. CP 375-76, 1010. Wells Fargo now acknowledges that Mr. Davis notified Wells Fargo of its error on October 10, 2001. Rsp Brf at 10; CP 230 (WF Phone Log). But the notice fell on deaf ears. Wells Fargo continued demanding the excessive escrow payments and attempting to foreclose on the Davis's home until August 2002 -- 10 months after receiving Mr. Davis's notice, 5 months after requesting a refund of erroneously paid taxes and nearly 3 months after receiving that refund. CP 30-33, 56-61, 76, 79, 230-34, 215-21, 380-81.

Wells Fargo's posturing its conduct as an "unintentional error" in "overcharging the Davises with excess property taxes and fees from 1999 to 2002" simply does not comport with the facts. Rsp. Brf. 7.

**B. The Davises Were Able to Stay Current on the Increased Obligation Until November 2001, When Wells Fargo Bounced Three Checks That It Had Agreed to Hold. (Rsp. Brf., III, B.)**

The Davises did not breach the mortgage agreement by tendering NSF checks to Wells Fargo in October and November 1999. Rsp. Brf. 7. The October 7, 1999 and November checks were NSF because the check from Mr. Davis' employer was late. CP 376. Mr. Davis made the payment and late charge on October 18, 1999 and December 16, 1999, respectively. CP 383-84. The January 20, 2000 payment that did not clear was promptly replaced with a substitute check on January 27<sup>th</sup>. *Id.*

The note provides that these late payments are not breaches if the payment and late charges are promptly paid. CP 865. As of November 2000, the Davises were current on all payments due Wells Fargo. CP 385.

**C. The Assessor's Property Tax Statements Did Not Alert the Davises to Wells Fargo's Error Because Wells Fargo Never Told the Davises That It Was Charging Them for Two Tax Parcels**

**and Misrepresented the Reasons for the Increases in Escrow Charges.** (Rsp. Brf. III, C.)

The County Assessor's annual tax statement did not alert the Davises to Wells Fargo's error because Wells Fargo had misrepresented the reasons for the increased escrow charges and the Davises believed what they were told. CP CP 376, ¶ 11. Wells Fargo always told the Davises that the increases were due to escrow shortfalls or changes in procedure. CP 375-76 (¶¶ 9-11), 378 (¶ 23), 380 (¶ 32); CP 971 (¶ 12). The lender's statements did not identify tax parcels. CP 381, ¶ 34.

The Davises could not send Wells Fargo "written notice disputing the debt" after receiving the May 2001 default notice because they did not discover Wells Fargo's misconduct until October 2001, from another lender. Rsp. Brf. 9; CP 381, ¶ 34. Wells Fargo cannot rely on tax statements to correct its misrepresentations. Detrimental reliance is not at issue anyway, because the lender refused to curtail its demands and oppressive legal actions even after receiving notice of its errors.

**D. The Modification Was Not An Agreement Settling any Dispute Because it Contained No Settlement Terms And Was Costly to the Davises, Who Were Forced to Accept It to Stop the Wrongful Foreclosure.** (Rsp. Brf. III, G; IV, C at 26-27,31.)

Wells Fargo presented the Davises with the Loan Modification as the only means for stopping the wrongful foreclosure. Ex. 37. The amount of the loan balance was not in dispute. The Davises were required to borrow an additional \$29,000.00 to pay over to Wells Fargo to bring current all unpaid interest. CP 74, Ex's 38, 39. Wells Fargo also required that the Davises reimburse it in cash for all legal expenses of the foreclosures. CP 531; CP 975, ¶ 36; CP 999-1000. Having received all the

funds due on the loan, Wells Fargo had no interest in money funds that Mr. Davis had been paying the bankruptcy trustee.

No new consideration flowed to the Davises. The date that payments started was dictated by Wells Fargo's procedures and did not reduce the interest to be paid or result in any loss to Wells Fargo or gain to the Davises. The modification documents do not contain any language purporting to settle disputes or to limit the Davises' future claims. CP 69-73, 999-1002.

**E. Wells Fargo Demanded a Standard Case Schedule at the Outset Because the Davises Were Asserting Personal Injuries.** (Resp. Brf. II, J.)

Shortly after the Complaint was filed, Wells Fargo demanded that the case proceed with the standard case schedule, rather than the expedited one for contract claims, because plaintiffs had claims for personal injuries:

On another matter, you selected an expedited case schedule for this litigation. However, you have alleged personal injuries to your clients including emotional distress, exacerbation of pre-existing medical conditions including panic, seizures, severe headaches, suicidal thoughts, sleep deprivation, fatigue and loss of appetite. These personal injuries are not simple contract claims as anticipated in cases on Pierce County's expedited case schedule. This case should be moved to the proper "standard" case scheduling so that your client's physical injuries can be made part of this litigation. In the alternative, you should dismiss your claims for personal injury no later than September 30, 2004.

WF Attorney Beard's September 23, 2004 letter to Davis attorney Nwokike, CP 349.

At Wells Fargo's insistence, the standard case schedule was substituted. The new trial date was October 3, 2005, still only 12 ½ months after Wells Fargo's Answer. CP 940, 1256-60.

**F. The Davises Notified Wells Fargo Early and Often of Facts Supporting their Personal Injuries and Consequential Damages, But Wells Fargo Did Not Pursue Damages Discovery After Obtaining Dismissal of Plaintiffs' Tort Claims Based on the Economic Loss Rule.** (Rsp. Brf. II, K, M, N, O, P).

As Mr. Beard's September 16, 2004 letter states, Wells Fargo knew from the outset that the Davises "alleged personal injuries . . . including emotional distress, exacerbation of pre-existing medical conditions including panic, seizures, severe headaches, suicidal thoughts, sleep deprivation, fatigue and loss of appetite." CP 349; *See* Complaint, ¶¶ 20,22, 24b, 41-45, CP 7, 8, 12. Mr. Davis Answered Interrogatories on September 30, 2004, describing these injuries. CP 1284, 1308. Wells Fargo's next discovery was plaintiffs' depositions in August 2005. CP 509.

Mr. Davis's interrogatory answers described Debbie Davis's seizure disorder, congenital heart prolapse and related anxiety disorder, headaches, anxiety, and panic attacks. CP 1302. He listed 9 hospitals where Mrs. Davis had received treatment and 5 hospitals that had treated him and stated that plaintiffs were "still working with our physician and shall make documents available." CP 1303-044. Levius Davis's November 16, 2004 declaration stated additional facts concerning these injuries. CP 974, 976, ¶¶ 35, 41.

Additional medical records were produced on February 4, 2005, attached to a declaration responding to summary judgment motions. CP 192-93, 264-75 274-323; CP 404-05. Extensive medical records were produced before trial and gathered in Trial Exhibits 66 and 67. CP 1230. Facts and supporting documents setting forth plaintiffs' consequential damages were submitted in plaintiffs' declarations filed on November 16, 2004, February 4, 2005, and August 24, 2005. CP 374-82, 974-76,

1177-1205.

**G. After Receiving Plaintiffs' September 2004 Interrogatory Answers, Defendants Sought No Follow-Up Discovery of Consequential Damages, Instead Taking the Position That Plaintiffs' Damages Were Limited to the Funds Wrongfully Disbursed From Escrow.** (Rsp. Brf. II, K, M, N, O, P).

Wells Fargo did not pursue further discovery of damages after entry of summary judgment dismissing tort claims. Instead, Wells Fargo moved for summary judgment on July 15, 2006 arguing that the Davises had no damages at all because Wells Fargo "made them whole" when it reimbursed their escrow account the amount that had been wrongfully disbursed. CP 1207. The trial court rejected Wells Fargo's argument on September 9, 2005. CP 1217-18. At that hearing, defense counsel asked, for the first time, that the Davises produce more damages documents. The trial court directed plaintiffs to file a Statement of Damages, which plaintiffs did. CP 517-90.

**H. Wells Fargo Refused to Provide Truthful Discovery and Withheld Production of Critical Documents, Forcing Plaintiffs' Attorney to Take 4 Depositions on the Eve of Trial and Move for an Order Excluding Wells Fargo's Evidence of Loan Servicing Practices.** (Rsp. Brf. II, K, M, N, O, P).

Wells Fargo's refusal to produce discovery forced the Davises to move to compel discovery, which the trial court directed on January 21, 2005 Wells Fargo to provide. CP 670, 694. Instead of complying, Wells Fargo's attorney sent the Davises a one page letter. CP 694-95. Wells Fargo never supplemented the letter. CP 1228., Ex. 41. It also refused to produce operating manuals stating procedures for its escrow and customer service departments. CP 666. Wells Fargo's discovery responses claimed to identify employees who had knowledge of practices central to plaintiffs' claims, only to have those witnesses disclaim any relevant knowledge during

depositions. CP 667-69, 675-82, 684-93, 703-08. Wells Fargo designated one trial witness, Kerry Kirtle, only a week before trial. CP 671. The computer generated documents produced from its Escrow and Customer Service Departments were computer printouts that were unintelligible because Wells Fargo had withheld the legend of special codes that is necessary to understand them. *Id.* Plaintiff's counsel learned these facts only days before trial, forcing him to prepare a Motion in Limine asking the court to exclude Wells Fargo's evidence that had been withheld. CP 665-716. As a result of these discovery violations and tardy document productions, discovery was not concluded until the Friday before the Monday trial. CP 671, ¶ 18.

### III. REPLY ARGUMENT

**A. The Davises' Contract Cause of Action Does Not Preclude Them From Asserting Tort Claims.** (Rsp. Brf. IV, A, B.)

The Supreme Court held in *Cherberg v. Peoples Nat'l Bank*, 88 Wn.2d 595, 564 P.2d 1137 (1977) that a plaintiff may assert contract and tort claims arising from the same misconduct, in that case, tort damages for intentional interference with business relationships arising from conduct that also breached the parties' lease. 88 Wn.2d at 530. *See, Gaglihari v. Denny's Restaurants*, 117 Wn.2d 426, 445, 815 P.2d 1362 (1991) ("*Cherberg* involved only the question of whether a breach of contract may also support a claim for liability in tort.")

**B. The Economic Loss Rule Does Not Limit the Davises to Contract Claims Because their Contract With Wells Fargo States No Such Limit.** (Rsp. Brf. IV, B, 2.)

Respondent agrees that the Economic Loss Rule applies only where the parties have "allocated risk by contract." Rsp. Brf. 24. Such risks are allocated by

terms limiting or disclaiming a party's liability for its own misconduct. The contract in *Griffith v. Centex Real Estate Corp.* 93 Wn. App. 202, 969 P.2d 486 (1998) contained a 1 year warranty limitation and disclaimed further warranties. The court did no more than "hold the parties to their contract." *Id.* at 212.<sup>1</sup> By contrast, where a contract contains no disclaimer or limited warranty, the plaintiff is not precluded from asserting both tort and contract claims. *Cherberg, Supra; Alejandre v. Bull*, 123 Wn. App. 611, 98 P.3d 844 (2004).

Wells Fargo's complicated, convoluted argument that the parties' contract "allocated the future risks and provided remedies" to the plaintiffs fails as a matter of law. Resp. Brf. 32. The references to "applicable law" in the Deed of Trust contain no language incorporating RESPA or the Deed of Trust Act into the contract. Resp. Brf. 29-30. Rather, the references to "applicable law," expressly provides that the borrower is not limited to contract remedies.<sup>2</sup> Resp. Brf. 27-32; CP 455, 867-75. Accordingly, rights conferred on the borrower by RESPA, RCW 61.42 or the FCRA do not insulate the lender from liability for misrepresentations or CPA violations.

**1. The Fair Credit Reporting Act Does Not Preempt The Davises' Common Law Claims Against Wells Fargo.**  
(Resp. Brf. IV, D, 2.)

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<sup>1</sup>*Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 821, 881 P.2d 986 (1994), is completely inapposite. There, a general contractor sued design professionals who had no contract with the contractor and owed no duty to the contractor to recover delay damages. There was no issue of limiting the contractor to contract damages.

<sup>2</sup>Wells Fargo could have included a disclaimer of liability or limitation of remedy clause in the contract, but did not. *See, Nat'l Bank v. Equity Investors*, 81 Wn.2d 866, 918, 506 P.2d 20 (1973)(Approving terms in guaranty contract excluding negligent administration of loan as defense.)

Wells Fargo's claim that the Fair Credit Reporting Act preempts the Davises' common law state claims is just wrong. Rsp. Brf 42-43. Except as expressly provided in subparts (b) and (c) of 15 U.S.C.A. § 1681t, the FCRA "does not annul, alter, affect, or exempt any person . . . from complying with the laws of any State . . ." 15 U.S.C.A. § 1681t (a). *Credit Data of Arizona, Inc. v. State of Ariz.*, 602 F.2d 195 (9<sup>th</sup> Cir. 1979) (Subchapter was not intended to preempt the field.). *Barnhill v. Bank of America, N.A.*, 378 F.Supp.2d 696 (D.S.C.2005)(FCRA preemption provision applies only to statutory causes of action regulating furnishers of credit information, and not to consumers' common law claims for libel and negligence); *accord, Jordan v. Trans Union LLC*, 377 F.Supp.2d 1307 (N.D.Ga. 2005)(defamation suit claiming malice); *Johnson v. Citimortgage, Inc.*, 351 F.Supp.2d 1368 (N.D.Ga.2004)(FCRA preempts only statutes regulating those furnishing credit information, not consumer's state common law claims); *Yutesler v. Sears Roebuck and Co.* 263 F.Supp.2d 1209 (D.Minn.2003)(No preemption of consumer's common law claims for defamation of credit and gross negligence against department store for failing to have fraudulently obtained credit card deleted with credit agencies' profile.).

Federal statutory and case law provide that the FCRA does not preempt the Davises' state law claims against Wells Fargo.

2. ***RESPA Does Not Provide a Private Remedy for Wells Fargo's Violation of the Statute by Charging Excessive Escrow Payments and Does Not Preempt State Law Claims.*** (Rsp. Brf. IV, B, 2, c.)

Wells Fargo erroneously claims that RESPA affords the Davises a remedy for Wells Fargo's "erroneous estimates" of taxes due and "erroneous charges for

property taxes” to be paid into their escrow account. Rsp. Brf. 29. However, while RESPA does prohibit mortgage servicers from charging homeowners excessive amounts for escrow accounts, it provides no private right of actions for violations of that provision. 12 U.S.C. § 2609; *Herrmann v. Meridian Mortg. Corp.*, 901 F.Supp. 915 (E.D.Pa.1995)(RESPA does not create an implied cause of action against loan servicers for breaching section prohibiting excessive escrow assessments.); *Bergkamp v. New York Guardian Mortgagee Corp.*, 667 F.Supp. 719 D.Mont. 1987)(Mortgagors had no private right of action under 12 U.S.C. § 2609 against mortgagee that required excessive deposits into escrow for taxes and insurance).

Finally, RESPA expressly provides that state laws are unaffected, except to the extent of a direct conflict with RESPA. 12 U.S.C. § 2616.

**C. Damages for Misrepresentations Affecting Property Interests Are Not Limited to Pecuniary Losses, But May Include Noneconomic Losses.** (Rsp. Brf. IV, B, 2. a.)

Wells Fargo also misstates the law by claiming that damages for the misrepresentation are limited to economic losses. Rsp. Brf. 25-26. The measure of damages for misrepresentations that cause damages is “all losses proximately caused by misrepresentation,” rather than the “benefit of the bargain” measure for fraud cases involving sales. *Chapman v. Marketing Unlimited*, 14 Wn. App. 34, 38, 539 P.2d 107 (1975)(Breach of contract and negligent misrepresentation). :

The "benefit of bargain" rule is more properly applicable and more easily applied to a case involving the sale and purchase of property, where the difference between the represented value and the actual value can be more readily determined and demonstrated. In the case at bar, however, where the plaintiff bought no property, but actually

suffered damage as a result of the misrepresentation, he is entitled to a recovery for the losses proximately so caused.

The same measure applies to negligent misrepresentation. *DeNike v. Mowery*, 69 Wn.2d 357, 358, 418 P.2d 1010, 422 P.2d 328 (1966)(purpose of awarding compensatory damages is to make plaintiff whole again.“The rule is no different in a case involving a negligent misrepresentation than where the injury is caused by actionable fraud.”).

The court affirmed a judgment for emotional distress from shock, anger, and upset in a fraud case brought against a business partner in *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 485, 805 P.2d 800 (1991). In *Birchler v. Castello Land Co.*, 133 Wn.2d 106, 942 P.2d 968 (1997), the Supreme Court held that emotional distress damages are recoverable for intentional interference with property interests in trees and vegetation, relying on *Schwarzmann v. Association of Apartment Owners*, 33 Wn. App. 397, 404, 655 P.2d 1177 (1982) where Judge Durham held: “This state has indeed recognized that damages for inconvenience, discomfort and mental anguish may result from an intentional interference with property interests.” The *Schwarzmann* court listed the following cases:

*Cherberg v. Peoples Nat'l Bank*, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977) (emotional distress damages for willful breach of lease); *Nordgren v. Lawrence*, 74 Wash. 305, 133 P. 436 (1913) (damages for mental suffering in action for wrongful entry by landlord into tenant's premises); *McClure v. Campbell*, 42 Wash. 252, 84 P. 825 (1906) (damages for mental suffering in action for wrongful eviction).

133 Wn.2d at 116. Certainly, the Davises' interest in preserving their home, their creditworthiness, and their reputations are likewise property interests.

**D. Emotional Distress Damages Are Also Available for Consequential Injuries to the Davises' Reputations and Creditworthiness.**

Wells Fargo's overcharges and misrepresentations led to the wrongful foreclosures and bankruptcy, the expenses for which the trial court found to be compensable damages. Wells Fargo's wrongful conduct caused the defaults and foreclosures that it reported to credit agencies, whether or not the reports themselves violated the Fair Retail Credit Act. As a consequence of Wells Fargo's misrepresentations and concealment of its excessive charges, the Davises suffered damage to their creditworthiness and reputations.

The injury that Wells Fargo caused to the Davises' credit is no different than that caused by a false report. The same measure of damages should apply to the same injury, regardless of the conduct producing liability. A person whose credit has been damaged by a false report is entitled to "actual damages," including mental anguish and emotional distress. *Rasor v. Retail Credit*, 87 Wn.2d 516, 554 P.2d 1041 (1976), *cited with approval, Martini v. Boeing Co.* 137 Wn.2d 357, 367, 97 P.2d 45 (1999). The *Rasor* court held that "actual injury is not limited to out-of-pocket loss" but "includes impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 87 Wn.2d at 529-30. There is no principled basis for applying a different measure of damage for the same injury regardless of the cause.

**E. Wells Fargo Fails To Identify Any Facts or Circumstances Establishing the Undue Prejudice That is Necessary to Support the Trial Court's Refusal to Allow Plaintiffs' to Amend the**

**Complaint to Add Supplemental Consumer Protection Act and Misrepresentation Claims.** (Resp. Brf. IV, C.)

The Davises moved 12 weeks before trial for leave to assert two supplemental claims against Wells Fargo: Misrepresentation and Consumer Protection Act, both arising from the same conduct alleged in the Complaint. Wells Fargo objected that it would be prejudiced, but did not describe any facts constituting undue prejudice. CP 491-91. It complained that (1) the trial date was 3 months away, (2) additional discovery may be necessary (without stating what that would be) and (3) there was not enough time before trial, three months away (unless the trial court revised the case schedule to allow additional discovery or continued the trial date). *Id.* Wells Fargo never claimed to need to retain an expert to defend a CPA or misrepresentation claim. Wells Fargo's witnesses *were* its experts on loan servicing practices.

The trial court's Order Denying Plaintiffs' Motion to Amend Complaint set forth no reasons supporting its conclusion that allowing the claims "would cause undue prejudice at this late date." CP 514. Wells Fargo's appellate brief contains generalizations about "case management issues" and "jury confusion," but likewise fails to state any facts demonstrating undue prejudice. Resp. Brf. 33-35.

The motion was brought on July 13, 2005, *twelve* weeks before the October 4 trial date, not six weeks. CP 422, 1256; Resp. Brf. 33. The two causes of action were already supported by facts stated in the complaint.<sup>3</sup> The complaint had always

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<sup>3</sup>Wells Fargo's reliance on claims asserted against Chicago Title is misplaced. Resp. Brf. 33-34. The trial court must decide claims against Wells Fargo on their own merits. The court cannot refuse to allow meritorious claims against one defendant because claims against another defendant may be problematic.

asserted that Wells Fargo had violated the CPA and made these misrepresentations. CP 4, ¶ 13; CP 7, ¶¶ 15, 23; CP 6, ¶ 19 So the complaint already put Wells Fargo on notice of the alleged misconduct.

Wells Fargo's reliance on undue delay is also meritless. Undue delay is a ground to deny a motion to amend only "where such delay works undue hardship or prejudice upon the opposing party". *Caruso v. Local 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983), citing *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 800, 399 P.2d 587 (1965).

Wells Fargo's claim that it was "prejudiced because the trial date had already been postponed once" is spurious. Rsp. Brf. 35. The trial date had not been postponed. Wells Fargo had *demand*ed that the standard case schedule replace the expedited case schedule. CP 349. The October 4 trial date was just 12 ½ months after the date of Wells Fargo's Answer, CP 940, 1256, so a brief delay to permit discovery or motions would not unduly delay resolution of the dispute.

Wells Fargo's actual argument was that adding 3 months before trial is, of itself, undue prejudice. Wells Fargo is wrong as a matter of law:

In the case before us, if the trial court's decision was based on undue delay, such a decision was an abuse of discretion. Unlike an attempt to amend the pleadings less than 1 week before trial, a motion to amend brought 3 months before a trial date allows sufficient time to conduct adequate discovery and prepare a case for trial, absent special circumstances.

*Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988). Even if more time was needed for discovery, any prejudice can be removed by granting a continuance:

Had the trial court been concerned about the length of time necessary to prepare for trial, it was within the court's discretion to grant a

continuance. *Quackenbush v. State*, 72 Wn.2d 670, 434 P.2d 736 (1967).

*Id.* at 885. The trial court abuses its discretion when it denies a motion to amend, but fails to state reasons:

Although the grant or denial of an opportunity to amend is within the discretion of the trial court, "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman, [v. Davis]*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)] 371 U.S. at 182. See also *Appliance Buyers Credit Corp. v. Upton*, supra [65 Wn.2d 793, 399 P.2d 587 (1965)].

*Id.* The trial court's decision denying the motion to amend should be reversed and this case remanded for trial of the Davises' misrepresentation and CPA claims.

**F. Wells Fargo's Claim That the Davises Waived Their Misrepresentation and CPA Claims By Signing The Loan Modification Agreement is Precluded By the Judgment and is Without Merit in any Case Because The Modification Does Not Satisfy The Elements for An Accord and Satisfaction or Account Stated.** (Rsp. Brf. IV, C at 26-27,31.)

The breach of contract judgment against Wells Fargo precludes it from now claiming that the loan modification agreement absolved it of all liability. CP 840-48, 928-30. Moreover, Wells Fargo never argued to the trial court that plaintiffs' claims were barred by the doctrines of accord and satisfaction or account stated, either in the three summary judgment motions or at trial.<sup>4</sup> *Ebling v. Gove's Cove*, 34 Wn. App. 495, 663 P.2d 132 (1983)(Failure to assert the defense in the trial court waives it.)

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<sup>4</sup>Wells Fargo includes "accord and satisfaction" in a generic list of possible defenses in the Answer and Trial Brief, but never presented any argument based on the doctrine. CP 940.

Finally, the modification agreement does not contain any of the requirements for an accord and satisfaction, including evidence that the parties considered it a final settlement of disputed claims. *Gleason v. Metropolitan Mortgage*, 15 Wn. App. 481, 498, 551 P.2d 147 (1976)(The party contending for that result must prove that both parties understood that such would be the result). A payment under protest is not an accord and satisfaction. *North Bonneville v. Bencor Corp.*, 32 Wn. App. 144, 147, 646 P.2d 161 (1982). The modification meets none of these requirements. *See* § II, D, *Supra*.

An account stated is simply an agreement that the amount specified is an accurate computation of the amount due the creditor.<sup>5</sup> *Northwest Motors, Ltd. v. James*, 57 Wn. App. 364, 788 P.2d 584, 798 P.2d 813 (1990). It is not a waiver of CPA and misrepresentation claims.

The Davises' misrepresentation and CPA claims are independent of the debt and not "defenses to payment of the loan" that are barred by an account stated. *Id.*

**G The Trial Court Erred in Excluding the Damages Referenced in Appellants' Brief Because Determination of Proximate Cause is for the Jury And Plaintiffs' Evidence Was Sufficient to Raise a Jury Question. (Rsp. Brf. IV, D.)**

Sorting the evidence and deciding proximate cause is the function of the jury, not the function of the court before any evidence is presented. *Micro Enhance v. Coopers & Lybrand*, 110 Wn. App. 412, 432-33, 40 P.3d. 1206 (2002). The testimony of the plaintiffs, plus bills of sale are sufficient to establish the loss from

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<sup>5</sup>To the extent that Wells Fargo considers the loan fees and foreclosure expenses that it wrongfully imposed on the Davises to be within the putative "account stated," the judgment for those fees and expenses that Wells Fargo's has paid precludes this defense.

selling their cars. It is undisputed that Mr. Davis's G. I. Bill rights were lost. The dispute over the cause of the loss is a jury question, after the testimony is presented. Damage to plaintiffs' credit rating and reputations can be established by the credit reports that were trial exhibits and the plaintiffs' testimony. Noting that "all awards must be supported by competent evidence," the *Rasor* court affirmed a jury award for damage to credit and reputation supported only by the plaintiff's testimony and that of an employee. *Rasor v. Retail Credit*, 87 Wn.2d 516, 530-31, 554 P.2d 1041 (1976)(While we acknowledge that such evidence of "actual damages" is not overwhelming, we find it sufficient to support the amount awarded by the jury here.). The trial court erred in not allowing plaintiffs to put on evidence of these claims.

**H. Wells Fargo Failed to Address the Fee Calculation Errors Stated in Appellants' Brief, Cannot Identify Any Attorney Time Devoted To "Massive Damage Theories" and Did not Describe Any Attorney Conduct Constituting "Unique Circumstances."**

Appellants' Brief sets forth specific errors in the trial court's fee calculation: excluding attorney time that had already been excluded; excluding the same time twice; excluding 4 days' time attending trial; excluding 69 hours of time on specified dates as duplicative, devoted to another defendant, or involving nonattorney work that the time records disclose were devoted to necessary legal work; excluding 100% of time spent "conferring" with co-counsel; excluding time as "coming up to speed" that counsel had already excluded from the fee application; and reducing the fees of both attorneys by 25% because one attorney had filed "unfocused" pleadings early in the case and because plaintiffs sought "unrealistic damages," where the trial court already had excluded the time preparing the referenced pleadings, as well as all time devoted

to tort theories, and the time records did not contain any time devoted to pursuing “unrealistic damages.” *See* App. Brf. 42-50, App. A, B.

Wells Fargo did not respond to any of these errors, instead focusing on attorney time that is *not* part of this appeal and on “massive damages theories” that were not the subject of any attorney time. Rsp. Brf. 47-50. Mr. Nwokike’s time devoted to nonlegal work is not part of this appeal. The trial court did not identify 15.3 hours of nonlegal work, in any case. Rsp. Brf. 48; 11/10RP 6-7. The court stated that “some items” of the excluded 109 hours were not recoverable because they were spent filing documents. *Id.* This appeal does not include that time. It concerns 68.9 of the 109 hours that the time records establish were devoted to compensable work.

Wells Fargo’s improperly references early settlement letters and a mediation brief as proof that plaintiffs’ sought unrealistically large settlement amounts – tacitly arguing that such beliefs caused counsel to “overwork” this case. Rsp. Brf. 48. The time records demonstrate, however, that counsel spent no time chasing unrealistic damages or creating extra work. Plaintiffs did not take multiple depositions, retain expensive experts, or file motions seeking information to fuel exotic theories. Plaintiff served one set of discovery requests, filed one motion to compel discovery, and took half day depositions of four Wells Fargo trial witnesses the week before the trial started. *See* time records and analysis, CP 756-839.

***1. Wells Fargo’s Claim That the Time Records “Lack Specificity” is Contrary to the Records; Extreme Specificity is Unnecessary Anyway.***

Wells Fargo’s complaint of a “lack of specificity” in time records is flatly contrary to the recordCP 756-839. The time records state in concrete detail the

exact legal work performed and the time devoted to that work<sup>6</sup>. Moreover, extreme specificity is not required. *Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 848, 905 P.2d 1229 (1995)(“An ‘explicit hour-by-hour analysis of each lawyer's time sheets’ is unnecessary.”)

2. ***Awarding Double the Damages and Limiting The Award Based Solely on the Recovery are Inconsistent With the Lodestar Method.***

Wells Fargo’s argument that the court may calculate fees by “doubling the special damages” or awarding a percentage of claimed losses is contrary to law. Resp. Brf. 48. *Edmonds v. Scott Real Estate*, 87 Wn. App. 834, 857, 942 P.2d 1072 (1997)(Calculating fee award by doubling fees incurred through mandatory arbitration held inconsistent with lodestar.)

Nor does the amount recovered restrict the reasonableness of the fees charged, where the legal work was reasonable for the complexity of the case or responds to pretrial tactics of the opposing party. The plaintiff in *Edmonds* filed suit to recover \$5,000.00 in earnest money. *Id.* After the defendant forced the case through trial de novo, the plaintiff’s fees totaled over \$70,000.00, which the trial court cut in half, admonishing counsel for “not economically preparing the case for trial de novo,” even though the defendant had been “obstructive and intransigent.” 87 Wn. App. at

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<sup>6</sup>Wells Fargo’s admonition that plaintiffs failed to present the trial court with the time analysis stated in Appellants’ Brief is disingenuous. Plaintiffs submitted a complete analysis of attorney time, including the time that had been excluded. CP 756-839. Wells Fargo’s response did not object to any time on the dates identified by the trial court in its decision, so plaintiffs had no opportunity to respond to such objections before the trial court’s decision. CP 849-62. Appendices A and B have all the time identified by the trial court as including the excludable work.

856. The Court of Appeals reversed, ordering that the fees be recalculated according to the lodestar method. *Id.*

3. ***To Determine The Reasonable Hours Expended in this Case the Court Must Take into Account the Complex Nature of the Claims and Documents, the Intransigence of Wells Fargo and the Work Required to Respond to Wells Fargo's Litigation Conduct.***

The trial court believed that too much time had been spent on the lawsuit, but refused to recognize what is plain from the time records and the voluminous record on appeal – that the fees were driven by the legal maneuvers of two huge law firms working together to defend the plaintiffs claims, who filed multiple summary judgment motions, joined in each other's motions, and stonewalled discovery. CP 591-601, 602-17, 618-47. Wells Fargo knew that the prevailing party would be entitled to recover reasonable fees, and chose to inundate plaintiffs with these motions, as well as motions regarding damages. It cannot complain that plaintiffs' counsel was forced to spend time responding to the motions and to the court's order to prepare a lengthy damages statement right before trial.

In addition, because Wells Fargo disputed everything, the 72 multipart trial exhibits were voluminous and contained dozens of complex lending and real estate documents, and arcane internal loan servicing records and customer service logs – all of which had to be organized and understood before trial. CP 1225-31.

No one examining the trial exhibits and court file could conclude that \$48,000.00 in legal fees is reasonable for prosecuting plaintiffs' claims from the complaint through the first three days of a jury trial and through post trial motions.

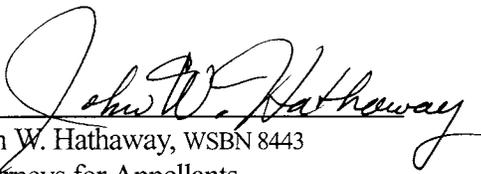
The trial court abused its discretion by reducing plaintiffs' fees in half based on justifications that are contradicted by the time records that the trial court cited.

#### IV. CONCLUSION

For the reasons stated above and in Appellants' Brief, the Davises ask the Court to reverse the summary judgment barring them from asserting tort claims because the Economic Loss Rule does not preclude such claims, reverse the order denying their motion to amend complaint to assert CPA and Misrepresentation claims; and reverse the orders in limine preventing them from asserting damages proximately caused by Wells Fargo. The Davises also ask the Court to hold that the trial court incorrectly excluded \$45,000.00 in attorneys fees that should be added to the award. Finally, the Davises ask the court to award them their reasonable attorneys fees on appeal.

**Dated** at Seattle, Washington this 3<sup>rd</sup> day of November, 2006.

**JOHN W. HATHAWAY, PLLC**

By   
John W. Hathaway, WSN 8443  
Attorneys for Appellants

