

WENDEL A. WITHROW
BOARD CERTIFIED*
CIVIL TRIAL LAW
PERSONAL INJURY TRIAL LAW
ADA MARIE WITHROW
W. DAVID GRIGGS
ANNE C. ROWE
OF COUNSEL

MARK W. SUTHERLAND
BOARD CERTIFIED*
ESTATE PLANNING AND PROBATE LAW
COMMERCIAL REAL ESTATE LAW
RESIDENTIAL REAL ESTATE LAW

LAW OFFICE OF
WENDEL A. WITHROW
1120 METROCREST, SUITE 200
CARROLLTON, TEXAS 75006
(972)416-2500
FAX(972)417-0685

LEGAL ASSISTANTS
DONNA M. ERVIN
DEBBIE WALTON
OFFICE MANAGER
LUCY M. WITHROW

5th Court of Appeals
FILED: 03/27/2012
14:00
Lisa Matz, Clerk

March 27, 2012

VIA HAND DELIVERY
AND BY E-MAIL ebrief@5th.txcourts.gov

Lisa Matz, Clerk of the Court
Fifth Court of Appeals
George L. Allen, Sr. Courts Bldg.
600 Commerce Street, Suite 200
Dallas, TX 75202-4658

RE: Wells Fargo Bank, N. A. As Trustee v. Lonzie Leath; Cause
No.: 05-11-01425-CV

Dear Clerk:

Enclosed are the original and three (3) copies of Appellee's
Brief for filing with the Court.

Thank you for your assistance.

Very truly yours,



Wendel A. Withrow

WAW/dme
Enclosures
cc: Robert L. Negrin (w/encl.)
Client (w/encl.)

CAUSE NO. 05-11-01425-CV

IN THE

COURT OF APPEALS

FOR THE

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT DALLAS, TEXAS

**WELLS FARGO BANK, N.A. AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN
TRUST 2006-1 ASSET-BACKED CERTIFICATES, SERIES 2006-1**

Appellant

v.

LONZIE LEATH

Appellee

**On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court No. DC- 08-07290**

APPELLEE'S BRIEF

LAW OFFICE OF WENDEL A. WITHROW
Wendel A. Withrow
Bar No.: 21830800
1120 Metrocrest, Suite 200
Carrollton, Texas 75006
Phone: 972-416-2500
Fax: 972-417-0685
ATTORNEY FOR APPELLEE

APPELLEE REQUESTS ORAL ARGUMENT

IDENTITY OF PARTIES AND COUNSEL

In order that the members of the Court may determine disqualification or recusal, the undersigned counsel for the Appellee certifies that the following is a complete list of the parties, their counsel, and all other parties known to have an interest in the outcome of this case:

1. Plaintiff and Appellee: Lonzie Leath
2. Attorney for Plaintiff and Appellee:

LAW OFFICE OF WENDEL A. WITHROW
Wendel A. Withrow
Bar No.: 21830800
1120 Metrocrest, Suite 200
Carrollton, Texas 75006
Phone: 972-416-2500
Fax: 972-417-0685
3. Defendant and Appellant: WELLS FARGO BANK, N.A. AS TRUSTEE FOR
OPTION ONE MORTGAGE LOAN TRUST 2006-1 ASSET-BACKED
CERTIFICATES, SERIES 2006-1
4. Attorneys for Appellant: CODILIS & STAWIARSKI, P.C.
Robert L. Negrin, SBN: 14865550
Mary M. Speidel, SBN: 18908400
650 N. Sam Houston Parkway, Suite 450
Houston, Texas 77060
Phone: 281-925-5200
Fax: 281-925-5300

TABLE OF CONTENTS

	<u>Page</u>
IDENTITY OF PARTIES AND COUNSEL	(i)
TABLE OF CONTENTS	(ii)
INDEX OF AUTHORITIES	(iii), (iv)
APPELLEE'S SUPPLEMENTAL STATEMENT OF FACTS AND BACKGROUND OF THE CASE	2, 3
APPELLEE'S REPLY TO APPELLANT'S SUMMARY OF THE ARGUMENT	4
APPELLEE'S REPLY TO APPELLANT'S ARGUMENT AND AUTHORITIES	5
REPLY TO ISSUES:	
I. The court erred by Signing a judgment that went beyond Finding and declaring the value of the property	5, 6, 7, 8, 9, 10
II. The jury's answer to the sole question presented was made on insufficient evidence or was made against the great weight and preponderance of the evidence and is manifestly unjust	11
III. The court erred in allowing the testimony of Ann Piper and admission of her valuation report	12, 13
IV. The court erred in its award of attorney's fees	14
V. In the alternative to the foregoing arguments, Wells Fargo was entitled to equitable subrogation for advances made at the request of Leath to pay his existing lien	15
CONCLUSION AND PRAYER	16
CERTIFICATE OF SERVICE	16
APPENDIX	17
A Respondent's Original Answer [RR Vol. 8 Defendant's Exhibit 51 and attached as Appellee's Exhibit 1]	
B Plaintiff's Original Petition [Appellee's Exhibit 2]	
C Motion to Strike Plaintiff's Expert RR Vol 1 or 1 p.8 [Appellee's Exhibit 3]	
D Plaintiff's Response to Defendant's Motion to Modify or Reform the Judgment and Defendant's Motion for New Trial (Appellee's Exhibit 4)	
E Defendant Wells Fargo Bank, NA as Trustee's Responses to Request for Disclosure (Appellee's Exhibit 5)	

INDEX OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Bonham State Bank v. Beadle</u> 907 SW2d 465, 467 (Tex. 1995)	5
<u>Cathey v. Booth</u> 900 SW2d 339 (Tex. 1995)	8
<u>Curry v. Bank of America</u> 232 SW3d 345 (Tex. App. Dallas 2007 pet. denied)	6, 8
<u>Custom Leasing, Inc. v. Texas Bank and Trust Company of Dallas</u> 516 SW2d 138, 144 (Tex. 1974).	9
<u>Doody v. Ameriquest Mortgage Company</u> 49 S.W.3d 342 (Tex. 2001)	8
<u>Garza v. Southland Corp.</u> 836 SW2d 214, 218 (Tex. App. - Houston [14 th Dist.] 1992	9
<u>Gilbane Bldg. Co. v. Two Turners Electric Co.</u> 2007 WL 582252 (Tex. App - Hou. 14 th District) 2007 Pet. Denied.	8
<u>Houston Health Clubs, Inc. v. First Court of Appeals</u> 722 SW2d 692; 693 (Tex. 1986)	5
<u>Logan v. Mullis</u> 686 SW2d 605, 609 (Tex. 1985)	5
<u>Marion v. Davis</u> 106 SW3d 860, 868 (Tex.App.Dallas 2003)	14
 <u>STATUTES</u>	
7 T.A.C. §153.91 - 153.93.	10
Tex. Admin. Code § 153.91	6
Texas Constitution.	4, 6, 7, 8, 10, 11, 13
 <u>OTHER AUTHORITIES</u>	
Declaratory Judgment Act	5, 6
Uniform Declaratory Judgments Act wherein CPRC 37.0039(c)	6
 <u>RULES</u>	
Tex. R. Civ. P. 94	8
Tex. R. Civ. P. 193.5	13
Tex. R. Civ. P. 272	9
Tex. R. Civ. P. 273	9
Tex. R. Civ. P. 274	9

Tex. R. Civ. P. 278 9
Tex. R. Civ. P. 301 5
Tex. R. Civ. P. 736 2, 7

CAUSE NO. 05-11-01425-CV

IN THE

COURT OF APPEALS

FOR THE

FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT DALLAS, TEXAS

WELLS FARGO BANK, N.A. AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN
TRUST 2006-1 ASSET-BACKED CERTIFICATES, SERIES 2006-1
Appellant

v.

LONZIE LEATH
Appellee

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court No. DC- 08-07290

Appellee, Lonzie Leath respectfully submits his brief for the Court's consideration. In this Brief, Appellant Wells Fargo Bank, NA as Trustee for Option One Mortgage Loan Trust 2006-1 Asset-Backed Certificates, Series 2006-1 is referred to as "Wells Fargo." Appellee Lonzie Leath is referred to as "Mr. Leath."

ORAL ARGUMENT

Mr. Leath requests oral argument pursuant to TRAP 38.1(e) only if the Court needs additional clarification or discussion of any particular issue raised.

APPELLEE'S SUPPLEMENTAL STATEMENT OF FACTS AND
BACKGROUND OF THE CASE

Procedural Background

1. On or about March 7, 2008, Wells Fargo filed an action seeking an order of foreclosure pursuant to *Tex. Riv. Civ. P. 736*. [RR Vol. 8 Def. Exhibit 50]

2. After Wells Fargo filed its TRCP 736 action for an expedited foreclosure, Mr. Leath filed his Answer on April 7, 2008 stating that the home equity loan had violated the Texas Constitution by exceeding eighty percent of the actual fair market value. [RR Vol. 8 Defendant's Exhibit 51 and attached as Appellee's Exhibit 1] NOTE: It is undisputed that Wells Fargo never attempted to "cure" this violation of the Texas Constitution.

3. Mr. Leath's live pleading for the Trial which is the subject of this appeal is Plaintiff's original Petition filed July 1, 2008. In paragraph III of this Plaintiff's Original Petition, Mr. Leath again gives written notice to Wells Fargo that the home equity loan violates the Texas Constitution. [Appellee's Exhibit 2] NOTE: It is undisputed that Wells Fargo never attempted to cure this violation.

4. In response to Wells Fargo's Motion to Strike Expert Ann Piper, a hearing was held by the Court on December 14, 2010. At that hearing, it was pointed out to the Court that the expert was disclosed as soon as the expert's identity was known and that information was provided by supplemental discovery response on August 24, 2010 (Appellant's Exhibit 6) which was over 8 months prior to the trial in May 2011. Said Exhibit 6 states the expert is available for deposition. NOTE: Wells Fargo made no request or attempt to depose Mr. Leath's expert and told the Court "... and my client doesn't want to take anymore depositions. We don't want to do anymore discovery." RR Vol. 1 of 1 p.8 (Appellee's Exhibit 3) NOTE: Wells Fargo took no depositions in this case. Further, there was testimony at the hearing that the parties were actively discussing modification of the loan up to and including the hearing date, which alone would have constituted "good cause" if necessary.

5. On December 20, 2010, a Second Supplemental Discovery Response was sent to Wells Fargo. (Appellant's Exhibit 7) Said Exhibit gave Wells Fargo all the required information over 4 months prior to the May 2011 Trial. NOTE: Wells Fargo made no request for the deposition of Expert Ann Piper.

6. At the trial of this cause, Mr. Leath's expert, Ann Piper, testified the fair market value was \$268,000.00 [Appellant's Exhibit 7] Wells Fargo's expert, Clyde Crum, testified the value was \$425,000.00, but that \$3,600.00 should be deducted from the \$425,000.00 [RR Vol. 8, Def. Exhibit 4 and RR Vol. 4. P. 71-72. Also, there was testimony as to a "drive-by" appraisal by Arnold's Appraisal for \$414,500.00 which pre-dated Mr. Crum's appraisal. (See RR Vol. 4 p. 108 and RR Vol. 4 p. 18-20 and the testimony of statements made by Ms. Yellow-Wings, a representative of the original lender H & R Block)]

7. The Jury found the fair market value to be \$421,400.00. [Appellant's Exhibit One]

8. Based on the Jury's finding to the only disputed fact issue, Judgment was rendered in accordance with the Texas Constitution's clear and unequivocal mandate.

APPELLEE'S REPLY TO APPELLANT'S SUMMARY OF THE ARGUMENT

Appellant paragraph 22: If the Court accepts Appellant's position, it would require multiple trials to resolve this dispute. Plaintiff's Original Petition (Appellee's Exhibit 2) Paragraph III and the prayer are specific and detailed.

- 1) The home equity loan exceeded 80% of the market value in violation of the Texas Constitution.
- 2) The Defendant has been notified and has "not corrected the failure to comply in any way."
- 3) That Plaintiff is asking the Court to declare "all principal and interest under the extension of credit is forfeited by Defendant..."

Appellant's paragraph 23: Appellant's complaint about insufficient evidence or against the great weight and sufficiency ignores the fact the jury accepted the testimony of Appellant's own expert.

Appellant's paragraph 24: Appellant's complaint about the testimony of Plaintiff's expert is without merit. The jury did not accept the testimony of Plaintiff's expert.

Appellant's paragraph 25: Appellant's complaint about attorney fees is not supported by Law or the facts of the case. The Appellant chose not to attempt any "cure" as provided by the Texas Constitution. Appellant violated the Texas Constitution by loaning greater than 80% of the Fair Market Value. The award of attorney fees is equitable, just and well within the Court's discretion.

Appellant's paragraph 26: Appellant's position or argument concerning "equitable subrogation" is without merit. It was never mentioned in any trial pleading, discovery response, testimony of any witness, document put into evidence, argument to the trial judge, or Post-Trial Motion. Any error or issue concerning equitable subrogation has been waived.

APPELLANT'S ISSUE I RESTATED:

**THE COURT ERRED BY SIGNING A JUDGMENT THAT WENT BEYOND FINDING
AND DECLARING THE VALUE OF THE PROPERTY**

APPELLEE'S REPLY ON ISSUE I

It appears Appellants are claiming the Court erred by not signing a judgment which simply recited the jury's answer to a fact question without any further "declaration" of what that finding means in context of this dispute.

Appellee would show that this type of Judgment would not be proper for the following reasons:

1. It would not provide a complete answer to the relief requested by Appellee as set out in detail in his Plaintiff's Original Petition. Such a limited Judgment violates the very core of TRCP 301 requiring:

RULE 301. Judgments

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity.

2. It would not end the litigation and in fact would require a second Declaratory Judgment suit be tried to a second jury on the issues of notice, failure to cure, and then maybe even a third jury on the issue of attorney fees. This would not only violate the public policy of avoiding multiple suits, but the specific ruling by the Texas Supreme Court that Judgment should dispose of all parties and issues. Houston Health Clubs, Inc. v. First Court of Appeals 722 SW2d 692; 693 (Tex. 1986)

3. Appellant has provided no case law to support such a limited reading of the Declaratory Judgment Act and the case law is clear that multiple lawsuits are to be avoided. See Logan v. Mullis 686 SW2d 605, 609 (Tex. 1985) and Bonham State Bank v. Beadle 907 SW2d 465, 467 (Tex. 1995) where the Court stated:

“A declaratory judgment is appropriate only if a justiciable controversy exist as to the rights and status of the parties and the controversy will be resolved by the declaration sought.”

In other words, the declaratory judgment is designed to resolve the controversy, not be an interim proceeding or finding which leads to a second lawsuit.

4. Any Final Judgment should include a finding on all disputed issues of fact found by the Jury, findings of undisputed facts necessary for resolution of the dispute, and conclusions of law as found by the Court based on those facts. In support of this reply point, Appellee would direct the Court to the plain language of Uniform Declaratory Judgments Act wherein CPRC 37.0039(c) gives the “Power of Courts to Render Judgment;” Form and Effect ... in any proceeding in which declaratory relief is sought and a judgment or decree will terminate the controversy or remove an uncertainty. (emphasis added)

In summary Appellant’s request for Judgment which simply states the jury question and Answer does not comply with public policy, case law, or the applicable rules.

As further Reply to Appellant’s Issue I Appellant begins a discussion at paragraph 9, page 11 about the Burden of Proof on the following issues:

1) The loan failed to comply with the constitutional requirements.

REPLY: The Jury found the fair market value was \$421,400.00. The Judge found the undisputed home equity loan was \$340,000.00 which is more than 80% of the fair market value in violation of the Texas Constitution.

2) “reasonable steps were taken to notify the lender of the alleged failure....” citing the Tex. Admin. Code § 153.91 and Curry v. Bank of America 232 SW3d 345 (Tex. App. Dallas 2007 pet. denied)

REPLY: Appellant’s complaint on appeal is that Mr. Leath did not carry his burden on this issue at trial. However, it should be noted that this complaint was never presented to the Trial Court until after the Jury’s verdict was received and Mr. Leath was requesting the Final Judgment be entered.

In further reply, Mr. Leath would show that this issue had never been disputed by pleading or testimony for the following reasons:

1. Mr. Leath testified he told the lender the appraisal was wrong in 2005 . RR Vol. 4 Pages 33-35. [NOTE: The house had been severely damaged by a storm and the condition of the house at closing and the state of repair was very much an issue for the appraisal and testified to at length at trial.]

2. Wells Fargo presented no testimony or written evidence that the issue of notice was ever contested or even addressed. Likewise, there is no evidence of correction or cure attempted by Wells Fargo at any time.

3. Mr. Leath testified that once the loan closed, he “could not get a response” from the lender RR Vol. 3 Page 181.

4. A letter was sent to counsel for Wells Fargo on January 25, 2008 which sets out in clear and unequivocal terms the violation of the Texas Constitution. This letter was attached to Mr. Leath’s response to Defendant’s Motion to Modify and or Reform the Judgment and Defendant’s Motion for New Trial see Appellee’s Exhibit 4 .

5. Wells Fargo presented no evidence that it made any effort to correct or cure the violation after received this letter on January 25, 2008.

6. After Wells Fargo filed its TRCP 736 action for an expedited foreclosure on March 7, 2008, Mr. Leath filed his Answer on April 7, 2008 stating that the home equity loan had violated the Texas Constitution by exceeding eighty percent of the actual fair market value. [RR Vol. 8 Defendant’s Exhibit 51 and attached as Appellee’s Exhibit 1].

7. Wells Fargo presented no evidence that it attempted to correct or to “cure” this violation of the Texas Constitution after April 7, 2008.

8. Mr. Leath’s live pleading for the Trial which is the subject of this Appeal is Plaintiff’s Original Petition filed July 1, 2008. In paragraph III of this Plaintiff’s Original Petition, Mr. Leath again gives another written notice to Wells Fargo that the home equity loan violates the Texas

Constitution. [Appellee's Exhibit 2]

9. Wells Fargo presented no evidence that it attempted to correct or to "cure" this violation of the Texas Constitution after July 1, 2008.

10. Appellants citation of Curry v. Bank of America 232 SW3d 345 (Tex.App.Dallas 2007 pet.denied) is not on point. This case involves the requirements of a Summary Judgment proceeding. The case has no applicability to a Jury Trial which is controlled by the Rules discussed in detail below. Curry is also a case where the lender appears to have actually had insufficient notice. Wells Fargo cannot make such an argument because the evidence otherwise is undisputed.

11. However, if the Court does believe Curry applies, then Mr. Leath has met his burden of showing notice to Wells Fargo on multiple occasions outlined in paragraphs 1-9 above.

12. The other citation by Appellant is Doody v. Ameriquest Mortgage Company 49 S.W.3d 342 (Tex. 2001) which states clearly at page 344: "When interpreting our state constitution, we rely heavily on its literal text and must give effect to its plain language." The Texas Supreme Court also discusses the lender's right to cure, but the facts are totally distinguishable. In Doody, the lender found their own error and refunded the differences. In the case before the Court, Wells Fargo, H & R Block and Option One all chose to ignore the notices of an appraisal problem and likewise refused any attempt at cure.

In response to the remainder of Appellant's argument under Issue One, Appellee would show the Court that the trial of this case is controlled by the following rules which were properly followed by the Trial Court:

The issue of what jury questions are to be submitted is controlled by the Texas Rules of Civil Procedure. As a brief summary for the Court:

- A. Rule 94 requires "any other matter constituting an avoidance or affirmative defense" to be plead or it is waived. Also, Defendant (Appellant herein) must establish all elements of an affirmative defense and request jury questions, or it is waived. See Cathey v. Booth 900 SW2d 339 (Tex. 1995) and Gilbane Bldg. Co. v. Two Turners

Electric Co. 2007 WL 582252 (Tex. App - Hou. 14th District) 2007 Pet. Denied. In this matter, Defendant has not plead, proved, or requested a jury question on the 'cure' issue.

- B. Rule 272 requires all objections to the charge be in writing or dictated to the Court Reporter or they are "waived." Specifically, the Texas Supreme Court has ruled: "Rule 272 Texas Rules of Civil Procedure, requires only the submission of disputed facts." Custom Leasing, Inc. v. Texas Bank and Trust Company of Dallas 516 SW2d 138, 144 (Tex. 1974). Defendant made no such objection.
- C. Rule 273 requires any requested Jury Questions to be submitted separately from any objections to the charge. Defendant made no such request.
- D. Rule 274. Objections and Requests
A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. Specifically, "when addressing a complaint on the submission of a jury question, any complaints not specifically in the objections are waived." Garza v. Southland Corp. 836 SW2d 214, 218 (Tex. App. - Houston [14th Dist.] 1992 . Defendant made no such complaint.
- E. Rule 278 specifically requires "... a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party." and "Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment;" Defendant made no such pleading or requested any jury question on the "cure" issue.

As a summary, Appellee would show there is undisputed evidence that Appellant failed to

cure the specific complaint after proper notice as follows:

- A. Mr. Leath's testimony at trial.
- B. Plaintiff's Original Petition filed July 1, 2008 stating the specific complaint that the loan amount exceeded 80% of the Fair Market Value.
- C. Ross & Matthews letter to Mr. Negrin's law firm dated January 25, 2008 pointing out the exact complaint (see Appellee's Exhibit 4) and the violation of the Texas Constitution. NOTE: This exhibit is especially important on the issue of harmless error. If the case is remanded, the jury will still not be asked to decide the issue of "notice". At the time of trial, it was and is "undisputed."
- D. Respondent's Original Answer filed in Cause #DC-08-02567-J informing Wells Fargo of the exact complaint and violation of the Texas Constitution. (See exhibits previously attached and Exhibit 51).

Of specific note and cited by Appellant, The Finance Commission and the Credit Union Commission has stated the cure provision only requires reasonable notice as set out in 7 T.A.C. §153.91 - 153.93. Certainly, the multiple notices given in A-D above satisfy this reasonable notice requirement.

Therefore, regardless of the failure of Wells Fargo to file an Affirmative Defense and their waiver of any complaints about the jury submission, the record in this case establishes as an undisputed fact that Wells Fargo had notice and multiple opportunities to tender a "cure," but did not do so at any time before, during, or after this trial.

As a final rebuttal and significant point, the Appellee attached Exhibit 5 is the Appellants Response to Request for Disclosure mailed on February 20, 2009. As the Court will note, the Appellant makes no mention of a notice or opportunity to cure defense which as stated earlier, only showed up after the Jury verdict and Motion for Judgment.

Appellants Issue I should be over-ruled.

APPELLANTS ISSUE II RESTATED

**THE JURY'S ANSWER TO THE SOLE QUESTION PRESENTED
WAS MADE ON INSUFFICIENT EVIDENCE OR WAS MADE AGAINST
THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE
AND IS MANIFESTLY UNJUST**

APPELLEE'S REPLY ON ISSUE II

The Appellant's complaint is without merit in law or fact.

The Jury's Answer was based on the testimony of Appellant's own expert Mr. Clyde Crum. If Appellant wishes to have the Jury or the Appellate Court disregard his own expert's testimony, he should not have designated Mr. Crum as his expert or called him to the stand.

Further, if the Court does disregard Mr. Crum's testimony, the remaining expert, Ann Piper, gave an even lower figure of \$268,000.00 and a prior "drive-by" appraisal was \$414,500.00 (RR Vol. 4 p. 18-20, 108) which have been even more serious violations of the Texas Constitution.

Appellants Issue II should be over-ruled.

APPELLANTS ISSUE III RESTATED

THE COURT ERRED IN ALLOWING THE TESTIMONY

OF ANN PIPER AND ADMISSION OF HER VALUATION REPORT

APPELLEE'S REPLY TO ISSUE III:

As related in Appellee's Reply on Issue II, the Jury accepted the Appellant's expert rather than the testimony of Ann Piper or her valuation report. Therefore, even if the Court erred in admitting the Piper testimony and report, the error was clearly harmless.

As a more specific reply, the Court's admission of Ms. Piper's testimony was not error as follows:

1. In response to Wells Fargo's Motion to Strike Expert Ann Piper, a hearing was held by the Court on December 14, 2010. At that hearing, it was pointed out to the Court that the expert was disclosed as soon as the expert's identity was known and that information was provided by supplemental discovery response on August 24, 2010 (Appellant's Exhibit 6) which was over 8 months prior to the trial in May 2011. Said Exhibit 6 states the expert is available for deposition. NOTE: Wells Fargo made no request or attempt to depose Mr. Leath's expert and told the Court "...and my client doesn't want to take anymore depositions. . . We don't want to do anymore discovery." RR Vol. 1 p.8 (Appellee's Exhibit 3) NOTE: Wells Fargo took no depositions in this case. Further, there was testimony at the hearing that the parties were actively discussing modification of the loan up to and including the hearing date.

2. On December 20, 2010, a Second Supplemental Discovery Response was sent to Wells Fargo. (Appellant's Exhibit 7) Said Exhibit gave Wells Fargo all the required information over 4 months prior to the May 2011 Trial. NOTE: Wells Fargo made no request for the deposition of Expert Ann Piper.

3. At the trial of this cause, Mr. Leath's expert, Ann Piper, testified the fair market value was \$268,000.00 [Appellant's Exhibit 7] Wells Fargo's expert, Clyde Crum, testified the value was \$425,000.00, but that \$3,600.00 should be deducted from the \$425,000.00 [RR Vol. 8, Def. Exhibit

4 and RR Vol. 4 p. 71-72.]

4. The Jury found the fair market value to be \$421,400.00 [Appellant's Exhibit One]

5. Based on the Jury's finding to the only disputed fact issue, Judgment was rendered in accordance with the Texas Constitution's clear and unequivocal mandate.

6. The Trial Court's admission of Ann Piper's testimony clearly complies with the TRCP Rule 193.5 which requires the supplementation of all experts to be 30 days in advance of trial. Appellant Wells Fargo had over 4 months and never asked for any further discovery or deposition.

Appellants issue III should be over-ruled.

APPELLANTS ISSUE IV RESTATED

THE COURT ERRED IN ITS AWARD OF ATTORNEY'S FEES

APPELLEE'S REPLY TO ISSUE IV:

In a Declaratory Judgment action, the Trial Court has full discretion in awarding attorney fees. The Jury verdict was in favor of the Appellee, Mr. Leath, and the Appellant has produced no evidence or credible argument that the Trial Court abused that discretion. This is especially true when the evidence was undisputed that the Lenders (H&R Block, Option One and Wells Fargo) had multiple opportunities to attempt a cure of the constitutional violation, but made no effort to do so for a period of approximately 5 years. (See Marion v. Davis 106 SW3d 860, 868 (Tex.App.Dallas 2003))

Appellants Issue IV should be over-ruled.

APPELLANTS ISSUE V RESTATED

**IN THE ALTERNATIVE TO THE FOREGOING ARGUMENTS, WELLS
FARGO WAS ENTITLED TO EQUITABLE SUBROGATION FOR ADVANCES
MADE AT THE REQUEST OF LEATH TO PAY HIS EXISTING LIEN**

APPELLEE'S REPLY ON ISSUE V:

Appellants "Alternative" issue has been waived. The issue of equitable subrogation was:
1) never plead by any party; (2) never mentioned in any pre-trial, trial, or post trial motion; (3) never mentioned by any witness; (4) never mentioned by any attorney addressing the Trial Court; (5) never contained in any document or other sworn testimony before the Court or the Jury; (6) never part of a requested Jury Question or Instruction; (7) never mentioned in Appellant's Disclosure Response or any other Discovery response.

Appellants Issue V should be over-ruled.

PRAYER

Appellee Lonzie Leath would hereby request the Court of Appeals to over-rule all of Appellant's issues as either waived, without merit or harmless.

Respectfully submitted,

LAW OFFICE OF WENDEL A. WITHROW

By: 

WENDEL A. WITHROW
State Bar No. 21830800
1120 Metrocrest, Suite 200
Carrollton, Texas 75006
Phone: 972/416-2500
Fax: 972/417-0685

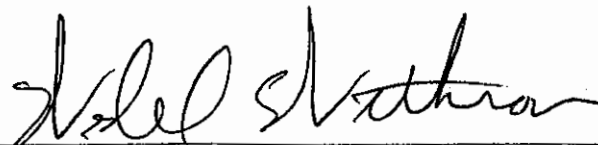
Attorney for Appellee
Lonzie Leath

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent on March 27 2012 via facsimile and U. S. Mail to:

VIA FAX ONLY #281-925-5300

Mr. Robert N. Negrin
Codilis & Stawiarski, P.C.
650 N. Sam Houston Parkway East, Ste. 450
Houston, TX 77060


WENDEL A. WITHROW

No. DC-08-02567-J

IN RE: Order for Foreclosure Concerning

LONZIE C. LEATH

and

936 HICKORY KNOB CIRCLE,
CEDAR HILL, TEXAS, Respondents

IN THE 191ST

JUDICIAL DISTRICT COURT

OF DALLAS COUNTY, TEXAS

FILED
08 APR -7 PM 3:08
GARY FITZSIMMONS
DISTRICT CLERK
DALLAS CO., TEXAS
DEPUTY

RESPONDENT'S ORIGINAL ANSWER

COME NOW, LONZIE C. LEATH and 936 HICKORY KNOB CIRCLE, CEDAR HILL, TEXAS, Respondents, and file this their Original Answer and would show as follows:

I.

Respondents deny each and every, all and several, of the material allegations in the APPLICATION FOR ORDER FOR FORECLOSURE herein, and demand strict proof thereof.

II.

By way of affirmative defense, Respondents would show that the home equity loan and resultant mortgage in question violates Article 16, Section 50, of the Texas Constitution in the said loan and resultant mortgage exceeded eighty per cent. of the actual fair market value of the property at the time the loan was closed.

Further, Respondents would show that Applicant agreed to defer payments on this mortgage pending the outcome of other litigation in which Respondent LONZIE LEATH is involved, and agreed, as consideration, to take a portion of any settlement or verdict in the other litigation to fully satisfy any past-due obligations hereunder.



REQUEST FOR DISCLOSURE TO APPLICANT

Pursuant to Rule 194, Texas Rules of Civil Procedure, you are required to disclose, within thirty (30) days of service of this request, the information or material described in Rule 194.2(a-i, and l), Texas Rules of Civil Procedure.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that Applicant take nothing in this cause, and that Respondents have all relief denominated in Article 16, Section 50, Texas Constitution.

Respectfully submitted,

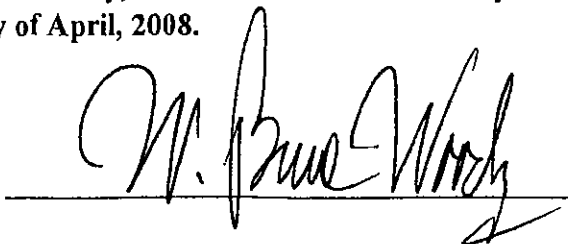
CANADA WITHROW, LLP



Wendel A. Withrow, SBOT No. 21830800
W. Bruce Woody, SBOT No. 21983580
1120 Metrocrest, Suite 200
Carrollton, TX 75006
972-416-2500
Fax: 972-417--0685
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, in accordance with Rule 21, Texas Rules of Civil Procedure, to attorneys for Applicant, Codilis & Stawiarski, P.C., Attn.: Rachel U. Donnelly, 650 N. Sam Houston Parkway East, Ste. 450, Houston, TX 77060 on this 3 day of April, 2008.



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Codilis & Stawiarski, P. C.
Attn: Rachel U. Donnelly
650 N. Sam Houston Parkway East
Ste. 450
Houston, TX 77060

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
July Boman Addressee

B. Received by (Printed Name) _____ C. Date of Delivery _____

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2.

PS

102595-01-M-2509

No. 08.07290

FILED

LONZIE C. LEATH

IN THE 2008 JUL -1 AM 10:47

V.

D-95th JUDICIAL DISTRICT COURT
DISTRICT CLERK
DALLAS CO., TEXAS
DEPUTY

WELLS FARGO BANK, N.A. AS TRUSTEE

OF DALLAS COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

COMES NOW LONZIE C. LEATH, Plaintiff, complaining of WELLS FARGO BANK AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2006-1 ASSET-BACKED CERTIFICATES, SERIES 2006-1, Defendant, and for cause of action would show as follows.

I.

Defendant may be served with process at Corporation Service Company, 701 Brazos, Suite 1050, Austin, Texas 78701.

Venue is proper in this County as Defendant has heretofore filed an APPLICATION FOR ORDER OF FORECLOSURE pursuant to Rules 735 and 736, Texas Rules of Civil Procedure seeking a summary order of foreclosure upon property located in this County. The hearing in said action has not been held. Pursuant to Rule 736 (10) this action is mandated to be filed in a district court of Dallas County.

This action, and Plaintiff so requests, should be conducted in accordance with Discovery Level III.

II.

The property concerned is described as follows: LOT 1, BLOCK 5 OF LAKE RIDGE VILLAGE II, WILDWOOD SUBDIVISION, SECTION 2, AN ADDITION TO THE



CITY OF CEDAR HILL, DALLAS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 86176, PAGE 2773, MAP RECORDS, DALLAS COUNTY, TEXAS. This property is the homestead of Plaintiff.

III.

Plaintiff contests the right of Defendant to foreclose this property on the basis that the principal amount of the debt secured by the lien upon which Defendant seeks to foreclose exceeded 80 percent of the true market value of the homestead on the date the extension of credit was made. This property is therefore protected from foreclosure by the terms of Section 50(a)(6)(B) of the Texas Constitution. Defendant has been notified of this failure to comply more than sixty (60) days ago and has not corrected the failure to comply in any way. Plaintiff would further show that the original mortgage company knew at the time of the loan that the debt exceeded 80% of the true market value in violation of the Texas Constitution.

IV.

Plaintiff would also show that the promissory note contains usurious late charges of 72% per annum on both principal and interest.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to answer and appear herein, and that on final trial, Plaintiff have a declaratory judgment that Defendant is not entitled to foreclose upon this property; that, pursuant to Section 50(a)(6)(Q)(x), Texas Constitution, this Court order that all principal and interest under the extension of credit is forfeited by Defendant; other damages in excess of the minimum jurisdictional limits of this Court, reasonable and necessary attorney's fees, and all costs of court.

Respectfully submitted,

CANADA WITHROW, LLP

A handwritten signature in black ink, appearing to read "Wendel A. Withrow". The signature is written in a cursive style and is positioned above a horizontal line.

Wendel A. Withrow, SBOT No. 21830800

W. Bruce Woody, SBOT No. 21983580

1120 Metrocrest, Suite 200

Carrollton, TX 75006

Phone: 972-416-2500

Fax: 972-417--0685

Attorneys for Plaintiff

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. DC-08-07290

LONZIE LEATH) IN THE DISTRICT COURT
)
)
vs.) DALLAS COUNTY, TEXAS
)
)
WELLS FARGO BANK, NA) 95TH JUDICIAL DISTRICT

MOTION TO STRIKE PLAINTIFF'S EXPERT

On the 14th day of December, 2010, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable, Judge Sheryl McFarlin Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by computerized stenotype machine.

Deana K. Adams
Official Court Reporter, 95th District Court
T: (214) 653-6747 - F: (214) 653-7991

EXHIBIT
3

1 not possibly have been -- there could not possibly have
2 been good cause for timely failure to -- to supplement,
3 because the valuation is central to the case.

4 That expert should have been lined up before the
5 petition was filed.

6 Next, it's the plaintiff's burden, or if
7 you can't meet the first one on showing good cause for
8 the Court to allow the expert testimony, that the
9 failure to timely make -- timely make, amend or
10 supplement the discovery response will not unfairly
11 surprise or unfairly prejudice the other parties.

12 In this case, it will, Your Honor.
13 Discovery is closed. We're set for trial on
14 January 24th. I've got an out-of-town witness that's
15 got to fly in for that trial, and -- and my client
16 doesn't want to take anymore depositions. We don't want
17 to do anymore discovery. We want to go to trial. We
18 want to go to trial on what we have, and we're not going
19 to do anymore discovery. And the plaintiff carries
20 those burdens under the rule to show that good cause,
21 Your Honor.

22 To allow the plaintiff to designate
23 his expert at this late date, without providing a report
24 or the particulars regarding the expert under the
25 disclosure rule, unfairly prejudices Wells Fargo. It

Deana K. Adams
Official Court Reporter, 95th District Court
T: (214) 653-6747 - F: (214) 653-7991

LONZIE C. LEATH

IN THE 95TH

V.

JUDICIAL DISTRICT COURT

WELLS FARGO BANK, N.A. AS TRUSTEE

OF DALLAS COUNTY, TEXAS

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION
TO MODIFY OR REFORM THE JUDGMENT AND
DEFENDANT'S MOTION FOR NEW TRIAL**

I.

Defendant has filed its Defendant's Motion to Modify or Reform the Judgment and Defendant's Motion for New Trial in Opposition to Motion for Entry of Judgment. Defendant has filed these Motions asserting the same arguments previously rejected by the Court during the Plaintiff's Motion for Final Judgment hearing on July 8, 2011. Further, Defendant's statements that the issue of "failure to cure" was presented to the Court is not supported by the Record. Defendant's statement that "all conditions precedent" were not met to meet the specificity requirements discussed below.

II.

In summary, Defendant relies on two cases to avoid the jury's verdict against Defendant.

A. The first case is: Curry vs. Bank of America 232 SW3d 345 (Tex. App. Dallas 2007 pet. denied).

Defendant's reliance on Curry is misplaced. Curry is a Summary Judgment case which does not even address the requirements of a contested jury trial and specifically the jury questions to be submitted or not submitted by the Court.

B. Defendant's second case is: Union Pacific Railroad Company vs. Williams 85 SW3d 162 (Tex. 2002). The main legal dispute in this case centers on when an "instruction" is proper or improper, but the issue of when a jury question is required is mentioned when the Court states:

"Moreover, we reaffirm Mitchell's recognizing that, if the evidence... is disputed, then

LAW OFFICES
ROSS & MATTHEWS, P.C.

3650 Lovell Avenue
Fort Worth, Texas 76107

Phone (817) 255-2044

Fax (817) 255-2090

Please reference our File Number 1329334 when replying

Neil A. Mabry
Of Counsel

January 25, 2008

Codilis & Stawiarski
650 N. Sam Houston Pkwy, # 450
Houston, Texas 75060

VIA FACSIMILE to 281-925-5300
AND REGULAR MAIL

Re: Account Number: 0019488717CNS44-08-0158
Borrower: Lonzie Leath
Property: 936 Hickory Knob Circle, Cedar Hill, Texas 75104

Dear Sir or Madam:

This letter is written on behalf of Lonzie Leath with regard to the above referenced mortgage. Initially, Mr. Leath received a notice that you intended to proceed to judicial foreclosure of this loan unless an agreement was reached between Option One Mortgage and Mr. Leath in regard to utilization of one of several loss mitigation options. Mr. Leath responded immediately seeking to effectuate a modification of the loan agreement which would place any alleged arrearage at the end of the amortization schedule and resume making his normal monthly payments. In this regard, Mr. Leath promptly completed and returned all submitted paperwork respecting his application to enter such an agreement.

In that there was no prompt response from Option One or your office concerning the status of this agreement, Mr. Leath contacted this firm regarding what would be his potential options with respect to preventing the foreclosure. I reviewed the paperwork that had been supplied to me by Mr. Leath and it appears to me that there may be a serious problem with the validity of your lien in regard to this property. According to the settlement statement provided to me by Mr. Leath, a disbursement of cash occurred to the borrower which would render this a Home Equity loan. As I am sure you are aware, under Article 16, Sec. 50 (a)(5)(B) the aggregate of all home equity financing against a homestead may not exceed 80% of the fair market value of such homestead.

There were two appraisals which were performed on this house and which were given consideration by the lender. Both are provided as attachments to this correspondence. The first appraisal was performed on April 18, 2003 and indicated that the house would have a fair market value equal to \$350,000.00 but was made expressly contingent upon completion of the construction project which was under way at the time. The second appraisal was performed on September 15, 2004 and was used by the lender in their final underwriting process. That appraisal report indicates that the determination of value was made as a result of a "recently completed...total renovation and mold remediation project." The condition of a property was described as being "like new."

Codilis & Stawiarski
January 25, 2008
Page -2-

However, the condition of the property was anything but like new and the repairs had not been effectively completed. On September 9, Mr. Leath had faxed a copy of an estimate from J. Beebe Construction Service and General Contractor Inc. to Larry Englart at Option One/H & R Block showing that over \$110,000.00 in repairs were necessary to the property due to improperly installed flooring and damage caused by the errors and omissions of the roofing contractor. This fax was followed by a second fax on September 17, 2004 wherein Mr. Leath again identified the two appraisals stating the fair market value to be \$350,000.00 and the contingency of same on the effective completion of the reconstruction project. Apparently believing that these problems could be resolved, Option One chose to proceed with the loan closing on October 23, 2004. The Settlement Statement indicates that its total amount of the loan provided by Option One was \$280,000.00. The condition of the property clearly did not warrant the appraised value being \$350,000.00 and you will note by review of the records of the Dallas County Appraisal District that, because of this condition, the 2006 and 2007 values have significantly declined from a high of \$333,890.00 to its current market value of \$232,880.00. Obviously, this presents serious issues with respect to the validity of your lien under Article 16, Sec.50.

As you may also be aware, Article 16, Sec. 50 offers you opportunities to address this situation and Mr. Leath may be amenable to your reasonable considerations which will prevent the foreclosure. I have advised Mr. Leath that due to the seriousness of this issue, he should immediately initiate litigation in the event you attempt to proceed with a foreclosure without addressing these issues. I would appreciate you providing to myself, in writing, a statement of Option One's position with respect to these matters. Thank you for your prompt attention to this matter.

Sincerely,



Neil A. Mabry
Of Counsel

NAM/baj
Enclosure(s)
cc: Lonzie Leath
File No.: 1329334

CAUSE NO. 08-07290

LONZIE LEATH § IN THE DISTRICT COURT
V. § DALLAS COUNTY, TEXAS
WELLS FARGO BANK, NA §
AS TRUSTEE § 95TH JUDICIAL DISTRICT

**DEFENDANT WELLS FARGO BANK, NA AS
TRUSTEE'S RESPONSES TO REQUEST FOR DISCLOSURE**

TO: Plaintiff, LONZIE LEATH, by and through his attorney of record, Wendel A. Withrow
Canada Withrow, LLP, 1120 Metrocrest, Ste. 200, Carrollton, TX 75006.

COMES NOW WELLS FARGO BANK, NA AS TRUSTEE, Defendant in the above
entitled and numbered cause, and pursuant to the Texas Rules of Civil Procedure, makes its
responses to the Plaintiffs' Request for Disclosure.

Respectfully submitted,

Codilis & Stawiariski, P.C.

By: 

Robert L. Negrin, TBN: 14865550
650 N. Sam Houston Parkway East, Ste. 450
Houston, Texas 77060
(281) 925-5200 - Phone
(281) 925-5300 - Fax
Attorney for
DEFENDANT WELLS FARGO BANK, NA AS
TRUSTEE

EXHIBIT

5

DEFENDANT WELLS FARGO BANK, NA AS TRUSTEE
RESPONSES TO PLAINTIFF'S REQUEST FOR DISCLOSURE

(a) State the correct names of the parties to the lawsuit.

RESPONSE: **Lonzie Leath, Plaintiff**

**Wells Fargo Bank, NA as Trustee for Option One Mortgage Loan Trust2006-1
Asset-Backed Certificates, Series 2006-1, Defendant**

(b) State the names, addresses, and telephone numbers of any potential parties.

RESPONSE: **Defendant is not aware of any potential parties.**

(c) State the legal theories and, in general, the factual bases of the responding parties claims or defenses (the responding party need not marshal evidence that may be offered at trial);

RESPONSE: **The note that is the subject of plaintiff's petition contains no usurious interest. Defendant has not received any compensation for the use, forbearance, or detention of money that exceeds the applicable maximum amount allowed by law.**

(d) State the amount and any method of calculating economic damages.

RESPONSE: **Defendant is not suing for the collection of money damages as its contract with Plaintiff is non-recourse. Defendant seeks only a judgment allowing foreclosure. Attorney's fees are sought by defendant so the amount will be liquidated and can be added to the loan when it is foreclosed. By a judgment, defendant seeks an order allowing foreclosure of Defendant's interest pursuant to rules 735 and 736 of the Texas Rules of Civil Procedure.**

(e) State the names, addresses, and telephone numbers of persons having knowledge of relevant facts, and give a brief statement of each identified person's connection with the case.

RESPONSE: **LONZIE LEATH, Plaintiff**

c/o Wendel A. Withrow

Canada Withrow, LLP

1120 Metrocrest, Ste. 200

Carrollton, TX 75006

He is the plaintiff in this case and can testify as to the specifics relating to the allegations made the basis of this lawsuit. He can also testify as to the damages he is seeking to recover.

Custodian of the Records for Defendant

c/o Codilis & Stawiarski, P.C.

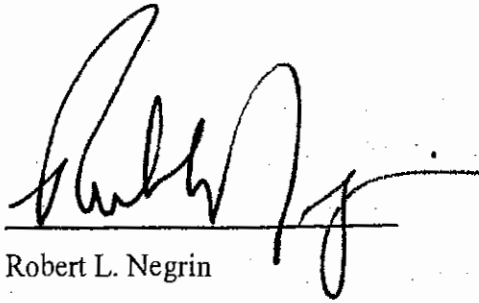
650 North Sam Houston Parkway East, Suite 450

Houston, Texas 77060

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent by certified mail, return receipt requested to the following parties on February 20, 2009:

Wendel A. Withrow
Canada Withrow, LLP
1120 Metrocrest, Ste. 200
Carrollton, TX 75006

A handwritten signature in black ink, appearing to read "Robert L. Negrin", is written over a horizontal line. The signature is stylized and cursive.

Robert L. Negrin