

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 10-1340

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| Jerry W. Washington and Golda M. Washington, | * |
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| Plaintiff- Appellants, | * |
| | * |
| v. | * |
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| Countrywide Home Loans, Inc., | * |
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| Defendant - Appellee. | * |

Submitted: April 14, 2011
Filed: July 28, 2011

Before RILEY, Chief Judge, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

Jerry W. and Golda M. Washington sued Countrywide Home Loans, Inc. under the Missouri Second Mortgage Loan Act (MSMLA), Mo. Rev. Stat. § § 408.231-408.241. The Washingtons alleged, for a putative class, that Countrywide charged them unauthorized interest and fees in violation of section 408.233.1 of the MSMLA. The case was removed from state court on diversity grounds based on the Class Action Fairness Act, 28 U.S.C. § 1332(d). The district court granted summary judgment for Countrywide. Having jurisdiction under 28 U.S.C. §1291, this court reverses and remands.

In April 2005, the Washingtons applied for a second mortgage loan from Countrywide. The principal amount of the loan was \$23,000, payable over 15 years at 12 percent interest. Before closing, Countrywide sent the Washingtons a Settlement Statement on a form, U.S. Department of Housing and Urban Development Settlement Statement (HUD-1). The HUD-1 statement notified them of four additional charges in connection with the loan: (1) \$690 loan discount, (2) \$100 settlement/closing fee, (3) \$60 document processing/delivery fee, and (4) \$37.80 in prepaid interest. These fees were included in the \$23,000 principal. The Washingtons signed the HUD-1.

Five days after the Washingtons signed the loan agreement, a Countrywide audit determined that the \$690 loan discount and the \$100 settlement/closing fee should not have been assessed. Countrywide wired Servicelink (the title company) \$790, which was paid to the Washingtons as part of their disbursement. Servicelink revised the HUD-1 statement to reflect the payment, removing \$790, the amount of the loan discount and the settlement/closing fee. The Washingtons were not told of the revised HUD-1 statement and never asked to sign it.

On appeal, the Washingtons allege that Countrywide violated the MSMLA by charging them all four amounts listed above.

This court first considers the \$690 loan discount and \$100 settlement/closing fee. The district court did not decide whether these two charges violated the MSMLA, holding that because these amounts were paid to the Washingtons in the first disbursement, they suffered no loss and thus lacked standing. This court reviews de novo the grant of summary judgment, viewing all evidence most favorably to, and making all reasonable inferences for, the non-moving party. *Country Life Ins. Co. v. Marks*, 592 F.3d 896, 898 (8th Cir. 2010).

To recover actual damages for a violation of the MSMLA, a person must suffer “any loss of money or property” as a result of a violation. *See Mo. Rev. Stat. §*

408.562. The facts in this case are undisputed. Countrywide charged the Washingtons \$790 for the loan discount and settlement/closing fee, which was financed as part of the principal of the loan. Although the Washingtons received the \$790 as part of the loan disbursement, Countrywide did not reduce the principal by \$790. Countrywide argues, and the district court agreed, that because the \$790 was returned to the Washingtons, they suffered no loss.

Countrywide's disbursement of the \$790, however, did not make the Washingtons whole. During the two days between April 26 (the date of the loan) and April 28 (the date the Washingtons received the first disbursement, including the \$790), the Washingtons paid 12 percent interest but were not able to use the \$790—which constitutes “any loss of money.”¹ *See Fielder v. Credit Acceptance Corp.*, 19 F.Supp.2d 966, 982 (W.D.Mo. 1998), *vacated in part on other grounds*, 188 F.3d 1031 (8th Cir. 1998) (applying § 408.562, the district court awarded actual damages to the class members who paid excess interest). The Washingtons have raised a material issue of fact as to whether they suffered “any” loss.

Countrywide further objects that the Washingtons cannot establish causation that any loss was “as a result” of the alleged MSMLA violations. Countrywide asserts that the Washingtons would not have changed the terms or amount of the loan even if they had received notice of the \$790, as they received \$790 and voluntarily paid the loan. Countrywide's voluntary-payment assertion is not available as a defense to a claim under the MSMLA. *See Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 499-500 (Mo. App. 2010) (transfer denied by Supreme Court on April 26, 2011) (rejecting defendants' voluntary-payment defense, the court noted that “allowing Defendants to present a voluntary payment defense would negate the MSMLA's provision for consumer protections”); *cf. Carpenter v. Countrywide Home Loans*,

¹ Purely for purposes of standing as to “any loss of money,” the Washingtons may have such a loss during the life of the loan, depending on whether the interest rate on the \$790 exceeds what they made on the \$790.

Inc., 250 S.W.3d 697, 703 (Mo. banc 2008) (rejecting “voluntary payment” defense to an unauthorized-practice-of-law violation, the court noted that “to hold the consumer, not the mortgage lender, responsible for recognizing the unauthorized practice of law and precluding recovery because of a voluntary payment would be ‘illogical and inequitable’”).

On appeal, the Washingtons request that summary judgment be entered for them on the \$690 loan discount and the \$100 settlement/closing fee. The district court entered summary judgment for Countrywide based on the Washingtons’ lack of statutory standing. Neither party moved for summary judgment on, and the district court did not consider, whether the loan discount and settlement/closing fees violated the MSMLA. This court cannot decide whether the \$690 loan discount and the \$100 settlement/closing fee violated the MSMLA. *See Williams v. City of St. Louis*, 783 F.2d 114, 116 (8th Cir. 1986) (this court remanded to the district court issues improperly decided on summary judgment because “a court may not pose the issue and then proceed to decide the same without a motion for summary judgment”); *Global Petromarine v. G.T. Sales & Mfg., Inc.*, 577 F.3d 839, 844 (8th Cir. 2008) (“[A] determination of summary judge *sua sponte* in favor of the prevailing party is appropriate so long as the losing party has notice and an opportunity to respond.”); *see also Hartford Fire Ins. Co. v. Clark*, 562 F.3d 943, 947 (8th Cir. 2009) (after reversing the district court’s dismissal of a claim as time-barred, this court remanded the remaining issues, which the district court had not considered); *Missouri Coalition for Env’t Found. v. U.S. Army Corps of Eng’rs*, 542 F.3d 1204, 1212-13 (8th Cir. 2008) (remanding FOIA segregability issue to the district court where the record was unclear whether the court had considered and rejected the issue, or did not consider it at all).

As for the \$60 document processing/delivery fee, the district court held that it was an authorized closing cost under § 408.33.1(3) of the MSMLA. Missouri regulates the fees lenders may charge in connection with a second mortgage loan. *See*

Mo. Rev. Stat. § 408.233. In exchange for allowing lenders to offer interest rates that exceed the statutory usury rate, the MSMLA limits the closing costs and fees that lenders may charge. *See Thomas v. U.S. Bank N.A. ND*, 575 F.3d 794, 796 n.1 (8th cir. 2009) (“The limits on closing costs and fees provided for in the MSMLA act as a trade-off for allowing lenders to charge a higher interest rate on second mortgage loans.”); *see also U.S. Life Title Ins. Co. v. Brents*, 676 S.W.2d 839, 841 (Mo. App. 1984) (explaining the MSMLA as a “fairly comprehensive” consumer protection measure that regulates “the business of making high-interest second mortgage loans on residential real estate”). Specifically, § 408.233.1(3) authorizes “[b]ona fide closing costs paid to third parties which shall include . . . (b) Fees for preparation of a deed, settlement statement, or other documents.” (Emphasis added.)

The Missouri Court of Appeals, in *Mitchell v. Residential Funding Corp.*, addressed, and rejected Countrywide’s arguments here. 334 S.W.3d at 499 (transfer denied by Supreme Court on April 26, 2011). In a diversity case, the law declared by the state’s highest court is binding. *See Erie v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision”). The Missouri Supreme Court allowed the *Mitchell* opinion to stand as authority, by denying transfer of the case from the court of appeals. The *Mitchell* case is, thus, the best evidence of Missouri law. “Decisions from Missouri’s intermediate appellate court (the Missouri Court of Appeals) . . . must be followed when they are the best evidence of Missouri law.” *Bockelman v. MCI Worldcom, Inc.*, 403 F.3d 528, 531 (8th Cir. 2005). *See also Eubank v. Kansas City Power & Light Co.*, 626 F.3d 424, 427 (8th Cir. 2010) (“When determining the scope of Missouri law, we are bound by the decisions of the Supreme Court of Missouri. If the Supreme Court of Missouri has not addressed an issue, we must predict how the court would rule, and we follow decisions from the intermediate state courts when they are the best evidence of Missouri law.”); *Travelers Prop. Cas. Ins. Co. of Am. v. National Union Ins. Co.*

of Pittsburgh, 621 F.3d 697, 707 (8th Cir. 2010) (same); *United Fire & Cas. Ins. Co. v. Garvey*, 328 F.3d 411, 413 (8th Cir. 2003) (same). See generally *Salve Regina College v. Russell*, 499 U.S. 225, 230, 238 (1991) (holding that “[w]hen *de novo* review is compelled, no form of appellate deference [to the District Court’s determination of state law] is acceptable”).

This court follows the *Mitchell* decision to resolve whether the \$60 document processing/delivery fee was an authorized charge. In *Mitchell*, the court of appeals affirmed the directed verdict that specific fees charged by lenders, including a “loan discount,” a “processing fee” and a “federal express” fee, violated the MSMLA. 334 S.W.3d at 495-99. The defendants there argued that they should have been given an opportunity to present evidence that a charge identified on the HUD-1A form² as a “loan discount” was really an “origination fee,” which is a permissible charge under the statute. See *Mitchell*, 334 S.W.3d at 499; § 408.233.1(5). The court of appeals rejected this argument, explaining that an origination fee should have been included in the HUD-1A’s line entitled “origination fee,” not in the line entitled “loan discount.” See *Mitchell*, 334 S.W.3d at 499. The court of appeals denied defendants the opportunity to re-characterize the charged fees. Instead, the HUD-1A’s identification of the fees determined whether they were permissible. See *id.* (“[T]he HUD-1A’s were documents *evidenced as a matter of law and showed as a matter of law* that [certain disputed fees] were not third party charges.”) (emphasis in original).

Like the defendants in *Mitchell*, Countrywide attempts to re-characterize the document processing/delivery fee as document preparation, which is an authorized charge under § 408.233.1(3)(b). See § 408.233.1(3)(b) (authorizing “[b]ona fide closing costs paid to third parties which shall include . . . (b) Fees for preparation of a deed, settlement statement, or other documents”). The Washingtons’ HUD-1 form

² The HUD-1A, a Settlement Statement for “Transactions without Sellers,” is identical to the HUD-1 Settlement Statement here for all relevant provisions.

has a line for “Document Preparation” and a separate line for “Document Processing/Delivery.” On the Washingtons’ HUD-1 form, Servicelink was paid \$60 for a “Document Processing/Delivery” fee. The “Document Preparation” line was left blank. Nevertheless, Countrywide, relying on dictionary definitions of “preparation,” asks this court to determine that the services performed by Servicelink were “preparation” of documents, and thus authorized by § 408.233.1(3)(b). This is precisely what the *Mitchell* court rejected. As in *Mitchell*, this court holds Countrywide to its own HUD-1 characterization; the charged services were for “document processing/delivery.”

Countrywide further argues that even if the document processing/delivery fee was not explicitly authorized, section 408.233’s list is not exclusive and permits additional “bona fide closing costs paid to third parties.” Unfortunately, a conflict exists between the Missouri Court of Appeals, and another district court as to whether section 408.233.1(3)’s enumerated list of authorized fees is exclusive. *Compare Mitchell*, 334 S.W.3d at 498 (holding that section 408.233’s list of permissible closing costs is exclusive), *with Mayo v. GMAC Mortg., LLC*, 763 F.Supp.2d 1091, 1104 (W.D.Mo.2011) (holding that section 408.233’s “enumerated fees are simply examples, not an exclusive list”). Again, this court follows the *Mitchell* court in determining that section 408.233’s list is exclusive. *See Erie*, 304 U.S. at 78. Because the document processing/delivery fee is not included in section 408.233’s exclusive list of authorized charges, it violated the MSMLA. *See also Mitchell*, 334 S.W.3d at 495-99 (affirming the circuit court’s directed verdict that a “Processing Fee” and a “Federal Express Fee” were not authorized and thus violated the MSMLA).

Finally, the Washingtons contend that the \$37.80 in prepaid interest Countrywide charged violates the MSMLA. “Section 408.236 provides that by violating the MSMLA’s fee limitations, Defendants were barred ‘from recovery of any interest on the contract.’” *Mitchell*, 334 S.W.3d at 506. Because the document processing/delivery fee violated the MSMLA, the prepaid interest Countrywide

collected on the Washingtons' loan was an additional violation of the statute. *See id.* at 502-03 (affirming jury instruction "to find liability if it believed Defendants 'directly or indirectly charged, contracted for, or received interest in connection with' the [second mortgage] loans").

This court reverses and remands to the district court for proceedings consistent with this opinion.
