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# 11th Circuit OKs FCRA \$115K Fee Award, But Opens Door for More

By [Greg Land](#) (/author/profile/Greg-Land/) | April 01, 2019 at 03:14 PM | Originally published on [Daily Report Online](#) (/dailyreportonline/)

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Judge Julie Carnes, U.S. Court of Appeals for the Eleventh Circuit (Photo: John Disney/ALM)

The U.S. Court of Appeals for the Eleventh Circuit ruled a trial judge was correct in awarding nominal damages and more than \$115,000 in fees but incorrect in tossing claims for emotional distress and punitive damages for a Florida couple who were repeatedly reported in arrears for a house they no longer owned.

The March 25 [opinion](#) (<https://images.law.com/contrib/content/uploads/documents/404/28408/11th-Circuit-Marchisio-v.-Carrington.pdf>) said the fee award should also be reopened after the case is litigated, with the sum already granted used as a “floor” for any additional fees.

The 60-page published ruling, written by Judge Julie Carnes with the concurrence of Judges Robin Rosenbaum and Frank Hull, comes more than 10 years after the Florida couple defaulted on their home loan. It is the second lawsuit stemming from the foreclosure and their ensuing struggle with Carrington Mortgage Services LLC.

As detailed in the opinion and court filings, Johnnie and Adrian Marchisio bought a home in 2006 in Port St. Lucie, but defaulted on their payments in 2008.

Their lender, Wells Fargo, initiated foreclosure proceedings, and the Marchisios signed over the deed to the property in 2009, closing the case.

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But Carrington kept attempting to collect mortgage payments and reported that they were delinquent to the three major credit reporting agencies.

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The Marchisios complained to Carrington and the agencies, but they could not get their credit reports corrected, and Carrington refused to correct the matter.

They sued Carrington in the U.S. District Court for the Southern District of Florida, and in 2013 reached a settlement under which Carrington agreed to correct their credit reports and paid them \$125,000.

Carrington missed the deadline to correct their credit reports but finally did so. But it also erroneously told the reporting agencies that the couple still owed a balloon payment of almost \$35,000.

The Marchisios complained to Carrington and the credit agencies about the inaccurate reports.

“Yet, notwithstanding their extensive litigation history with the plaintiffs,” the opinion said, Carrington continued to maintain that the balloon payment was due.

“If that wasn’t bad enough, defendant then began charging plaintiffs for lender-placed insurance on the property that plaintiffs turned over to defendant years earlier and no longer owned,” it said.

The Marchisios again filed suit in the Southern District, asserting claims including violation of the Fair Credit Reporting Act, the Florida Consumer Collection Practices Act and breach of contract.

Chief Magistrate Judge Frank Lynch Jr. granted summary judgment to the couple on the FCRA claim and awarded \$3,000 in damages, and attorney fees and costs of \$115,860.

But Lynch denied their request for emotional distress and punitive damages, “finding as a matter of law that plaintiffs had not shown entitlement to those damages.” Lynch also dismissed the breach of contract claim, “holding that plaintiffs had failed to prove any recoverable damages.”

Both sides appealed his rulings and the fee award, “which plaintiffs viewed as too inadequate and defendant viewed as excessive.”

Carnes’ order upheld Lynch’s ruling affirming the FCRA claim, but reversed him on the other rulings and vacated the fee award “so the district court can recalculate those fees at the conclusion of the litigation.”

Regarding the emotional distress claims, the couple had testified that they experienced “anxiety, rapid heartbeats, and marital distress,” which raised issue of material fact that should be considered by the trier of fact, Carnes wrote.

Lynch’s dismissal of the punitive damages claim “presents two problems,” she said. “First, plaintiffs were not required to raise punitive damages on summary judgment and the court summarily disposed of the issue without hearing from either party.”

Second, the FCRA allows for recovery of punitive damages for “willful” violations, the opinion said.

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In dismissing that claim, Lynch had written that the "finding of willfulness is not based on any intentional or purposeful misdeed" by Carrington, but Carnes said the

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U.S. Supreme Court has declared that "willful" violations "include reckless conduct." Law Topics (/topics/) Surveys & Rankings (/rankings/) Public Notice & Classifieds (/dailybusinessreview/static/public-notices-classifieds

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"Thus, the 'intentional or purposeful standard' used by the district court does not comport with the Supreme Court's definition of willfulness," she said.

"To be clear, we make no ruling here concerning whether there may be any limits on a plaintiff's ability to receive punitive damages under the FCRA where the willful conduct at issue directly involves only reckless, not intentional conduct. We simply reverse the sua sponte grants of summary judgment to defendant to allow factual development of this issue at trial."

The state Collection Act claim must also be reinstated, she said, so that a jury could decide whether Carrington had taken reasonable steps to ensure that its collections efforts and reporting practices adequately safeguarded consumers as required by the law.

The breach of contract claim also was improperly dismissed, the opinion said, because there was an issue of fact as to whether Carrington's erroneously reported delinquencies breached their settlement agreement and damaged their ability to get credit.

The Marchisios are represented by Jay Kim and Kristin Palacio of [Kim Vaughan Lerner \(http://kvllaw.com/\)](http://kvllaw.com/) and Paul Kim of [Glazer & Sachs \(http://www.condo-laws.com/\)](http://www.condo-laws.com/); their appeal was argued by Donna Solomon of [Solomon Appeals, Mediation & Arbitration \(https://www.solomonappeals.com/\)](https://www.solomonappeals.com/). All three firms are in Ft. Lauderdale.

"On behalf of our clients, we are pleased that the Eleventh Circuit found that there are many issues that should be decided by a jury," said Jay Kim via email. "We look forward to telling that jury about the Marchisios' struggle to correct their credit reports."

Carrington's counsel includes Christopher Hahn and Hector Lora of [Maurice Wutscher \(https://mauricewutscher.com/\)](https://mauricewutscher.com/) in Fort Lauderdale; Shannon Miller of Maurice Wutscher's office in Wayne, Pennsylvania; and Ernest Wagner of Chicago's McGinnis Wutscher Beiramee.

They declined to comment.

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### Greg Land

Greg Land covers topics including verdicts and settlements and insurance-related litigation for the Daily Report in Atlanta.



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KATHERYN TUCKER

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"The Court agrees with QuikTrip that there were no prior incidents that were sufficient to put QuikTrip or any of its employees on notice of the allegedly dangerous condition of not having a security guard on weekday nights," ruled Senior Judge Clarence Cooper.

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