

IN THE
MISSOURI SUPREME COURT

No. SC84028

BEVERLY LINES,
Plaintiff/Appellant,

vs.

MERCANTILE BANK, N.A. f/k/a
MERCANTILE BANK OF
SOUTH CENTRAL MISSOURI,
Defendant/Respondent.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
31ST JUDICIAL CIRCUIT
The Honorable Calvin R. Holden

APPELLANT-S SUBSTITUTE BRIEF

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This action involves a suit instituted to recover damages authorized by ' 443.130, R.S.Mo., by reason of the failure of a mortgagee to timely effect the release of a deed of trust after the indebtedness for which it was given to secure was satisfied and demand provided by statute had been submitted. Appeal has been taken from an order granting summary judgment for the mortgagee. The ruling of the trial court was that satisfaction of the outstanding indebtedness, as a condition precedent to submission of demand authorized by ' 443.130, R.S.Mo., had not been effected at the time of the demand, as entry of a court order dismissing a prior suit relating to the indebtedness had not been entered before demand was made for release of the deed of trust. The claims and defenses involved in this action, and the order granting summary judgment, require the application and interpretation of the substantive law of the State of Missouri.

This appeal is properly before the Supreme Court of the State of Missouri and within its appellate jurisdiction by reason of exercise of its authority and entry of order on the 20th day of November, 2001, sustaining application for transfer submitted by appellant pursuant to Rule 83.04.

STATEMENT OF FACTS

On or prior to the 30th day of November, 1999, Beverly Lines and Laurence E. (Bud) Lines and Mercantile Bank, N.A., formerly known as Mercantile Bank of South Central Missouri, effected a settlement of then pending litigation in the Circuit Court of Greene County, State of Missouri. The settlement provided release by Mercantile Bank of Beverly Lines and Bud Lines, among others, from any and all obligations of outstanding indebtedness, including indebtedness theretofore claimed by Mercantile Bank as being secured by a deed of trust recorded in Book 2308 at Page 1367 in the office of the Recorder of Deeds of Greene County, Missouri. (L. F. p.1 - paragraph 1 of Count I of the Petition; L. F., pp. 7-11 - Exhibit AC@to the Petition - ASettlement and Mutual Release Agreement@dated the 30th day of November, 1999.)

The ASettlement and Mutual Release Agreement,@ along with a Stipulation For Judgment And Dismissal With Prejudice, and a Judgment and Order of Dismissal were delivered to attorney Thomas Millington on November 29, 1999. Attorney Millington represented Bud and Beverly Lines, among others, in the prior suit pending in the Circuit Court of Greene County, Missouri. (L.F. p. 93 at &8 -Mercantile=s response to Request for Admissions commencing at L.F. p. 91.) The ASettlement and Mutual Release Agreement@ with signatures of Laurence E. (Bud) Lines, Beverly J. Lines and all other plaintiffs in the underlying suit, as well as the signature of their attorney, Thomas Millington, was returned with the Stipulation For Judgment And Dismissal With Prejudice, also executed by Thomas Millington, to the offices of Mercantile=s attorneys on November 30, 1999. (L.F. p. 93 -Request for Admission No. 9 and Mercantile=s response thereto.)

Paragraph 5 of the ASettlement and Mutual Release Agreement@dated November 30, 1999, provided

in pertinent part that AMercantile agrees that, upon request, it shall execute appropriate releases of any security instruments to the extent that such security instruments secure any of the obligations.@(L.F. p. 8.)

The settlement of the prior lawsuit evidenced in part by the ASettlement and Mutual Release Agreement@ was effected pursuant to a written settlement offer dated September 13, 1999 (L.F. p. 5) and reiterated in writing on October 18, 1999 (L.F. p. 6).

The settlement offer of October 18, 1999, was accepted by attorney for Mercantile Bank on October 27, 1999 (L.F. p. 72-76 - Affidavit of Thomas W. Millington, particularly paragraph 8 thereof appearing at L. F. p. 73.)

The ASettlement and Mutual Release Agreement@ was the result of modifications of drafts submitted by attorneys for Mercantile Bank, delivered to attorney Thomas Millington, on November 16, 1999 (L.F. p. 79), November 22, 1999 (L.F. p. 80), November 29, 1999 (L.F. p. 81) and finally, by hand-delivery to attorney Millington of final settlement documentation including Stipulation For Judgment And Dismissal With Prejudice, and Judgment and Order of Dismissal on November 29, 1999. (L.F. p. 82.) All the settlement documentation executed by every member of the Lines Group and plaintiffs named in the settlement documents was delivered to the offices of the bank=s attorneys on November 30, 1999, including the executed Stipulation For Judgment And Dismissal With Prejudice. (L.F. p. 93, Mercantile=s response to Request for Admission No. 9.)

Beverly Lines, and her now deceased husband, Bud Lines, made demand for release of a deed of trust securing the Aobligations@ by letter submitted by certified mail, return receipt requested, dated December 2, 1999, a copy of which was attached to Plaintiffs=Petition marked as Exhibit AD@. (L.F. p. 2 - paragraph 6 of Plaintiffs=Petition; L.F. p. 12.) The demand letter for release of the deed of trust enclosed a check in

the amount \$27.00 payable to Mercantile Bank (L.F. p. 3, &9; admitted by Mercantile at L.F. p. 24, &&8, 9 and 10.) The check was cashed by Mercantile Bank (L.F. p. 63, &18 - Affidavit of Laurence E. Lines.)

The demand letter for release of the subject deed of trust was received by Mercantile Bank on the 3rd day of December, 1999. (L.F. p. 3, &7; admitted by Mercantile Bank at L.F. p. 24, &8.) The demand letter also enclosed a copy of the ASettlement and Mutual Release Agreement@ which acknowledged the satisfaction of all outstanding debt. (L.F. p. 3, &10; admitted by Mercantile at L.F. p. 24, &11.)

Suit was filed in this case seeking recovery of the statutorily authorized damages on December 28, 1999. (L.F. p.1.) Two days after suit was filed (December 30, 1999) and twenty-seven days after receipt of the demand letter, a deed of release was filed by Mercantile Bank in the office of the Recorder of Deeds of Greene County, Missouri, releasing the subject deed of trust. (L.F. p. 40, &124.) The suit for statutory damages was filed two days prior to the filing of the release of the deed of trust.

The fifteenth day following the delivery of the demand letter for release of the deed of trust, excluding weekends and holidays, (Exhibit AD@ to Plaintiff's Petition, L.F. p. 12) was December 24, 1999. This fact is established by virtue of review of any calendar.

The Stipulation For Judgment And Dismissal With Prejudice of the prior suit, which had been executed by counsel for plaintiffs on November 30, 1999, and delivered to the bank's counsel on November 30, 1999, was filed in the prior suit on December 13, 1999. (L.F. p. 40, &127.) The Judgment and Order of Dismissal was signed by the court on December 14, 1999. (L.F. p. 145.)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, MERCANTILE BANK, AND HOLDING THAT A FULL SATISFACTION^e OF THE INDEBTEDNESS DID NOT OCCUR UNTIL THE COURT SIGNED THE JUDGMENT AND DISMISSAL WITH PREJUDICE ON DECEMBER 14, 1999 BECAUSE THE OBLIGATION OF MERCANTILE BANK TO RELEASE THE DEED OF TRUST WAS LEGALLY ENFORCEABLE AFTER NOVEMBER 30, 1999, (L.F. PAGE 75, PARAGRAPH 13-14 AND L.F. PAGE 93, NO. 9) DUE TO SATISFACTION OF THE UNDERLYING INDEBTEDNESS FOR WHICH IT WAS ORIGINALLY GIVEN TO SECURE AND TIMELY STATUTORY DEMAND FOR RELEASE PROPERLY MADE, IN THAT ALL PERFORMANCE AND CONSIDERATION DUE FROM BEVERLY LINES, AND OTHERS, UNDER THE TERMS OF THE A SETTLEMENT AND MUTUAL RELEASE AGREEMENT^e HAD BEEN PERFORMED AND EXTENDED ON NOVEMBER 30, 1999, AND THE DEBT WAS SATISFIED BY SETTLEMENT ON OR BEFORE THAT DATE. MERCANTILE BANK HELD IN ITS POSSESSION THE ASTIPULATION FOR JUDGMENT AND DISMISSAL WITH PREJUDICE^e, EXECUTED BY HER COUNSEL IN THE UNDERLYING SUIT, ON NOVEMBER 30,

1999, AND MERCANTILE BANK OR ITS ATTORNEYS, ON ANY DAY THEREAFTER, COULD HAVE SOUGHT ENTRY OF A FORMAL ORDER OF DISMISSAL OF THE UNDERLYING SUIT. THE SUBMISSION OF THE EXECUTED STIPULATION, ITS FILING WITH THE COURT AND THE ENTRY OF ORDER OF DISMISSAL BY THE COURT DID NOT IN ANY MANNER CONSTITUTE A CONDITION PRECEDENT TO SATISFACTION OF THE UNDERLYING OBLIGATION AND WAS NO MORE THAN AN ADMINISTRATIVE OR MINISTERIAL ACT TO BE PERFORMED, WITHOUT DISCRETION, AND AFTER ALL CONSIDERATION AND PERFORMANCE ON THE PART OF BEVERLY LINES HAD BEEN EXTENDED, PROVIDED AND ACCEPTED. THE RECEIPT OF THE STATUTORY DEMAND LETTER ON DECEMBER 3, 1999 BY MERCANTILE RESULTED IN THE COMMENCEMENT OF TIME LIMITATION FOR IT TO PROCEED WITH ITS DUTY TO RELEASE THE DEED OF TRUST PRESCRIBED BY SECTION 443.130 RSMo. AS THE DEMAND LETTER ENCLOSED PROOF OF SATISFACTION OF THE INDEBTEDNESS SECURED BY THE DEED OF TRUST, WAS SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, ENCLOSED A CHECK FOR RECORDING COSTS WHICH WAS CASHED BY THE BANK AND THEREFORE SATISFIED ALL ELEMENTS OF A CLAIM FOR STATUTORY DAMAGES PROVIDED BY

SECTION 443.130.

Byrd v. Liesman, 825 S.W.2d 38 (Mo.App. 1992)

Central Production Credit Assoc. v. Reed, 805 S.W.2d 300 (Mo.App. S.D. 1991)

Tabor v. Ford, 240 S.W.2d 737 (Mo.App. 1951)

POINT II.

II. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, MERCANTILE BANK, BECAUSE THE DEMAND LETTER SUBMITTED PURSUANT TO SECTION 443.130 INVOKED THE PROVISIONS AND SATISFIED ALL OF THE ELEMENTS OF THE STATUTE PRESCRIBING THE CONTENTS OF A DEMAND FOR A RELEASE OF A DEED OF TRUST, IN THAT THE PLAIN LANGUAGE OF THE STATUTE DOES NOT REQUIRE REFERENCE TO THE STATUTE ITSELF WITHIN ANY DEMAND LETTER, OR THE PROVISION OF LEGAL ADVICE TO A MORTGAGEE OR WARNING OF POSSIBLE CONSEQUENCES WHICH MIGHT BEFALL A MORTGAGEE UPON ITS FAILURE TO ACT TIMELY AND RELEASE A DEED OF TRUST IN RESPONSE TO A DEMAND LETTER. THE ENCLOSURE OF THE ASETTLEMENT AND MUTUAL RELEASE AGREEMENT[®] WITHIN THE DEMAND LETTER CONSTITUTED PROOF OF THE SATISFACTION OF THE OUTSTANDING INDEBTEDNESS FOR WHICH THE DEED OF TRUST WAS GIVEN TO SECURE AND THEREBY, IN COMBINATION WITH OTHER ELEMENTS CONSTITUTING CONDITIONS PRECEDENT TO RECOVERY OF THE DAMAGES AUTHORIZED BY THE STATUTE, PROPERLY INVOKED THE STATUTORY REMEDY UPON THE

FAILURE OF MERCANTILE BANK TO PROVIDE OR RECORD A DEED OF RELEASE WITHIN FIFTEEN BUSINESS DAYS FOLLOWING ITS RECEIPT OF THE LETTER ON DECEMBER 3, 1999. FURTHER, THE EVIDENCE OF THE SATISFACTION OF INDEBTEDNESS EMBODIED WITHIN THE ASETTLEMENT AND MUTUAL RELEASE AGREEMENT^e ENCLOSED WITHIN THE DEMAND LETTER SATISFIED ALL OTHER SPECIFIC REQUIREMENTS EMBODIED WITHIN THE STATUTE FOR A GOOD FUNDS^e AND IDENTIFICATION OF MORTGAGORS, INCLUDING BEVERLY LINES, WHO WERE ENTITLED TO RECEIVE THE BENEFIT OF THE RELEASE OF THE DEED OF TRUST, OR ALTERNATIVELY, TO RECOVER THE STATUTORY DAMAGES FOR FAILURE TO RESPOND TIMELY TO THE DEMAND LETTER.

Brownstein v. Rhomberg-Haglin & Associates, 824 S.W.2d 13 (Mo. 1992)

Spradlin v. City of Fulton, 982 S.W.2d 235 (Mo. 1998)

Section 400.3-401 RSMo.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, MERCANTILE BANK, AND HOLDING THAT A FULL SATISFACTION^e OF THE INDEBTEDNESS DID NOT OCCUR UNTIL THE COURT SIGNED THE JUDGMENT AND DISMISSAL WITH PREJUDICE ON DECEMBER 14, 1999 BECAUSE THE OBLIGATION OF MERCANTILE BANK TO RELEASE THE DEED OF TRUST WAS LEGALLY ENFORCEABLE AFTER NOVEMBER 30, 1999, (L.F. PAGE 75, PARAGRAPH 13-14 AND L.F. PAGE 93, NO. 9) DUE TO SATISFACTION OF THE UNDERLYING INDEBTEDNESS FOR WHICH IT WAS ORIGINALLY GIVEN TO SECURE AND TIMELY STATUTORY DEMAND FOR RELEASE PROPERLY MADE, IN THAT ALL PERFORMANCE AND CONSIDERATION DUE FROM BEVERLY LINES, AND OTHERS, UNDER THE TERMS OF THE A SETTLEMENT AND MUTUAL RELEASE AGREEMENT^e HAD BEEN PERFORMED AND EXTENDED ON NOVEMBER 30, 1999, AND THE DEBT WAS SATISFIED BY SETTLEMENT ON OR BEFORE THAT DATE. MERCANTILE BANK HELD IN ITS POSSESSION THE ASTIPULATION FOR JUDGMENT AND DISMISSAL WITH PREJUDICE^e, EXECUTED BY HER COUNSEL IN THE UNDERLYING SUIT, ON NOVEMBER 30,

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SECTION 443.130.

Standard of Review

This is an appeal from an order entered granting summary judgment. The standard of review is *de novo*. An appellate court need not defer to a trial court's order granting summary judgment as the criteria on appeal for testing the propriety of a summary judgment order is no different than the criteria to be employed by a trial court in sustaining the motion initially. The court should review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Finance v. Mid-Am Marine*, 854 S.W.2d 371 (Mo.banc 1993); *Boshers v. Humane Society of Missouri, Inc.*, 929 S.W.2d 250 (Mo.App. 1996).

Argument

The trial court determined that the record before it established that full satisfaction had not been provided to Mercantile Bank prior to the time of the submission of the demand letter authorized by ' 443.130, R.S.Mo., and therefore concluded that the demand letter was untimely, barring any recovery sued for in the form of the statutory damages authorized by ' 443.130, R.S.Mo.

The statute speaks for itself. ' 443.130 triggers an obligation to pay damages if a demand is made, and all other elements of the statute are met. The statute provides:

1. If any such person, thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, deliver to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely, and any other damages such person may be able to prove such person has sustained, to be recovered in any court of competent

jurisdiction. A business day is any day except Saturday, Sunday and legal holidays.

2. To qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee, cestui qui trust, or assignee by certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.

3. In any action against such person who fails to release the lien as provided in subsection 1 of this section, the plaintiff, or his attorney, shall prove at trial that the plaintiff notified the holder of the note by certified mail, return receipt requested.

The question controlling the propriety of the ruling of the trial court is whether Mercantile Bank received satisfaction, only upon execution by the court of the order of dismissal with prejudice of the underlying suit. The undisputable evidence before the court was that Mercantile had received satisfaction of the debt no later than November 30, 1999. The demand letter dated December 2, 1999, received by the bank on December 3, 1999 commenced the start of the statutory deadline and not the date of signature of the trial court on the dismissal with prejudice.

The evidence of satisfaction in this case was the ASettlement and Mutual Release Agreement,@ executed by mortgagors, among others, acknowledging relinquishment of all indebtedness by Mercantile Bank and all claims of Beverly Lines and others asserting damages and contesting enforceability of outstanding indebtedness and all supporting collateral security instruments including the deed of trust in question.

On November 30, 1999, Mercantile Bank, by and through its authorized representatives, held in

its possession all settlement documentation needed to effect, document and prove full relinquishment of all claims and satisfaction of outstanding indebtedness and prior damage claims asserted.

The court's determination that full satisfaction was not accomplished until the court signed the dismissal of the underlying action constitutes a misinterpretation of the law, the requirements of ' 443.130, and creation of an extra duty on the party of Beverly Lines not provided for in the underlying settlement or the statute. The parties in the prior suit had agreed to a dismissal with prejudice of all claims no later than November 30, 1999, as provided in the Settlement and Mutual Release Agreement. (L.F. p. 7, & 1.)

There was not one additional act or duty for Beverly Lines or any other member of the Lines Group to perform; not one additional document to sign; not one additional letter to be submitted without which she would not have been entitled to full and complete performance of the obligations due from Mercantile Bank. By the terms of the settlement documentation, particularly paragraph 5, the only other performance due was on the part of Mercantile Bank. The performance was administrative and ministerial in nature. Signatures of the bank's representatives or its attorneys on documents they had submitted and sponsored was ministerial. Submission of the executed Stipulation For Judgment and Dismissal With Prejudice, (signed by counsel for Beverly Lines) to the court and obtaining the entry of an order effecting dismissal with prejudice of the underlying suit, was administrative and ministerial. It was not discretionary.

Commitment for dismissal with prejudice had been made prior to November 30, 1999 and documented on November 30, 1999. (L.F. p. 7, & 1.) All pending claims could have been dismissed without court order. Rule 67.02(a) and Rule 67.04. The fact that Mercantile desired to have an order of dismissal signed by the court did not convert the requirements of the settlement to a discretionary matter or to an agreement that was contingent and enforceable only after entry of a non-essential court order.

This is not a case where the underlying facts supporting the various motions for summary judgment were controverted. Only the appropriate legal conclusions to be drawn from the uncontroverted material facts were at issue.

The trial court apparently concluded that satisfaction of the underlying obligation could not have been legally effected until all ministerial acts had been performed. The trial court improperly interpreted and applied the law. The settlement was final, without a doubt, after everything had been performed by Beverly Lines and members of the Lines Group on November 30, 1999, if not before. It was final because it was enforceable. It was enforceable because it was identifiable. Enforceability of the settlement as of November 30, 1999, was further supported because performance had ensued. It made little difference whether the attorneys for Mercantile Bank sought to have the Stipulation For Judgment And Dismissal With Prejudice filed and formal dismissal order entered on December 1st, 2nd, 3rd or 4th of 1999, or for that matter, months later. The obligation of the bank, after receiving request and demand to release the deed of trust, was enforceable no later than November 30, 1999, or any date thereafter.

It is obvious and clear that a settlement is valid and enforceable even though all settlement documentation has not been completed. *Byrd v. Liesman*, 825 S.W.2d 38 (Mo.App. 1992). In this case, it is respectfully submitted that settlement effected of the underlying suit was enforceable at any time after October 27, 1999, and certainly no later than after November 30, 1999, when Beverly Lines and other members of the Lines Group identified in the underlying suit had signed and performed every conceivable aspect of the settlement that was due from them.

Beverly Lines was entitled after November 30, 1999, to proceed with submitting a request or statutory demand for the bank's performance, i.e. release of the deed of trust. The bank in endeavoring

to claim that it was not obligated to release a deed of trust under any demand letter submitted pursuant to ' 443.130, R.S.Mo., until all of the documentation was in place and order of dismissal entered, ignores the obvious.

The bank could have effected the ministerial or administrative tasks at any time it chose to do so. It was of no consequence to Beverly Lines when or how the bank proceeded to effect dismissal of her prior lawsuit. It was of significant consequence to Beverly Lines when the bank proceeded with performance of its new obligations, which it willingly undertook, under the terms of the ASettlement and Mutual Release Agreement.@

Every settlement agreement ordinarily contemplates some new or substituted performance. This case simply involves a failure on the part of Mercantile to effect timely performance and its fabricated excuses for lack of timely performance after proper statutory demand for the same has been submitted.

A review of the demand letter submitted for release of the deed of trust in Greene County, in light of the requirements of ' 443.130, establishes that Beverly Lines and her now deceased husband, Bud Lines, met every single requirement imposed by the statute. The letter was submitted by certified mail, return receipt requested. The letter was received by Mercantile on December 3, 1999. The letter enclosed a copy of the ASettlement and Mutual Release Agreement@executed by all members of the Lines Group and proved satisfaction of the debt. The bank=s attorneys had in their hands, on November 30, 1999, every document relating to the settlement agreement. The bank had evidence that the debt secured by the deed of trust was satisfied. The demand letter enclosed a check for the expense of filing and recording the release. The check was cashed by Mercantile Bank.

It is believed that the trial court may have been engaged in a strict construction of ' 443.130 in

view of the facts of this case and, in doing so, caused it to reach the result obtained. Certainly, Mercantile Bank vigorously asserted that a strict construction of the statute should be applied in view of the facts of this case. (See L.F. p. 46.)

It is submitted that the ruling of the trial court was wrong, whether the court placed a strict construction standard upon the statute in view of the facts of this case, or liberal construction. However, in as much as it is believed that the strict construction of the statute, if in fact that were the case, would have been in error, some time should be spent in addressing the argument asserted by Mercantile Bank that the statute should be strictly construed.

First, it must be conceded that there are a number of cases from the Missouri Court of Appeals indicating that because ' 443.130, R.S.Mo., provides for damages of what has often been called a penalty, that the statute must be treated as one that is penal in nature and therefore should be strictly construed. The Missouri Court of Appeals has reiterated that interpretation of the law in its ruling in *Roberts v. Rider*, 924 S.W.2d 555 (Mo.App. S.D. 1996), wherein the court clearly stated in pertinent part, at page 558, as follows: AHowever, ' 443.130 is penal in nature and therefore must be strictly construed.@ It is believed that portion of the holding in the *Roberts* case and the other authorities cited by Mercantile and argued before the trial court for strict construction of ' 443.130 is flatly in error.

The law of the State of Missouri and its scope is defined with a mandate for application from our general assembly as stated in ' 1.010, R.S.Mo. This statute defines what our common law in this state is, and will be, and specifically provides, in pertinent part, the following:

... (b) but no act of the General Assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in

derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof. (emphasis added.)

The foregoing from ' 1.010 indicates the potential error of any court in utilizing strict construction principles when interpreting ' 443.130 or other statutes providing for civil remedy.

Section 443.130 itself does not refer to a penalty. It refers to a forfeiture of damages in the amount of ten percent (10%) of the face amount of the security instrument and such other damages as may be proven.

The courts have construed the statute to be penal as they have construed the statute to call for the payment of a penalty. Payments of penalties in the form of double damages, treble damages, exemplary or punitive damages, or any other penalty provided in a remedial statute providing private civil rights of action does not turn the statute into a penal statute to be thereafter strictly construed. However, developing case authorities interpreting the application of ' 443.130 have apparently managed to accomplish such a transition on the books reporting decisions of the courts of this state.

Commencing from an initial analysis and keeping in mind the legislative mandate provided in ' 1.010, the following is revealed: A penal statute or penal law is defined by Black's Law Dictionary, Sixth Edition, as follows:

Penal laws. Term, in general, refers to state and federal statutes that define criminal offenses and specify corresponding fines and punishment. Statutes imposing a penalty, fine or punishment for certain offenses of a public nature or wrongs committed against the state.

Strictly speaking, statutes giving a private action against a wrongdoer are not penal in their nature, neither the liability imposed nor the remedy given being penal. If the wrong done is to the individual, the law giving him a right of action is remedial, rather than penal, though the sum to be recovered may be called a penalty or may consist in double or treble damages. *Huntington v. Attrill*, 146 U.S 657, 13 S.Ct. 224, 36 L.Ed. 1123.

Beverly Lines seeks the remedy provided by ' 443.130 under the facts of her claim. She was at all times, and presently is, entitled to liberal construction of the statute as it is remedial in its nature.

A remedial statute is defined by Black's Law Dictionary, Sixth Edition, as follows:

ARemedial Laws or Statutes. Legislation providing means or method whereby causes of action may be effectuated, wrongs redressed and relief obtained is remedial@

A thorough analysis of the distinction between remedial statutes and penal statutes was provided in the case of *Tabor v. Ford*, 240 S.W.2d 737 (Mo.App. 1951), wherein the Missouri Court of Appeals in referencing United States Supreme Court authority dealing with the subject stated the following at page 738:

Our decision herein, as the case is presented, depends upon the construction of Section 205(e), supra, whether it is penal or remedial in nature.

The leading and often cited case of *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 277, 36 L.Ed. 1123 states: APenal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving

a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given are strictly penal.®

In *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65, 66, 51 L.Ed. 241, the court holds that an action for treble damages under an anti-trust act is not a suit for a penalty, that: "The construction of the phrase 'suit for a penalty,' and the reasons for that construction, have been stated so fully by this court that it is not necessary to repeat them.® Citing *Huntington v. Attrill*, supra.

In *James-Dickinson Farm Mortgage Company v. Harry*, 273 U.S. 199, 47 S.Ct. 308, 71 L.Ed. 569, the court speaking through Mr. Justice Brandeis, and relying upon the *Huntington* case, supra, held that a statute of the State of Texas, allowing exemplary damages to the extent of double the actual damages (for false representations) was not a penal law, and that recovery thereunder might be had in the courts of another state.

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In *Desper v. Warner Holding Company*, 219 Minn. 607, 19 N.W.2d 62, 66, the court said: "With respect to the argument that the cause of action is penal * * * it is sufficient to note that the section in question provides for a private remedy to the person wronged by the violation of the act.® Quoting from *Huntington v. Attrill*, supra, and citing other authorities. "Nor does the fact that ' 205(e) authorizes the recovery of a flat sum transform the cause of action from a remedial to a penal one.® (Citing authorities.) "Under the foregoing authorities, the conclusion cannot be escaped that ' 205(e) is clearly

remedial.@

In *Whatley v. Love*, La.App., 13 So.2d 719, 722, it is held that section 205(e) is not penal, the court stating: "Concerning the contention that the Act of Congress under consideration imposes a penalty, the argument is wholly without merit, since it has been held numerous times that this act and other similar acts such as the anti-monopoly statute with its triple damage provision and the Fair Labor Standards Act, 29 U.S.C.A. ' 201 et seq., are not penal statutes.@ The court cites *Huntington v. Attrill* supra, and many other cases.

Legal interpretation as espoused by the United States Supreme Court and repeated in the opinion in *Tabor v. Ford, id.*, remains applicable to date. A statute is not penal in nature, merely because it calls for the assessment of damages in favor of individual civil litigants of what is mistakenly characterized as a penalty.

Our Missouri Supreme Court has held for years that a remedial statute should not be strictly construed, even though it may change a common law rule. *Steggall v. Morris*, 258 S.W.2d 577 (Mo.banc 1953).

In *State ex rel. LeFevre v. Stubbs*, 642 S.W.2d 103 (Mo.banc 1982), the Missouri Supreme Court held that a remedial statute should be construed so as to meet cases which are clearly within the spirit or reason of law, or involving or within the evil which the statute was designed to remedy, providing interpretation is not inconsistent with the language used in resolving doubts in favor of applicability of the statute to the particular case.

The rule on construction of remedial statutes was reiterated by the Missouri Supreme Court in *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338 (Mo.banc 1991), wherein the court held that

statutes that are remedial in nature are to be liberally construed so as to effect their beneficial purpose.

Section 443.130 provides a statutory remedy and minimum level of damage recovery available to a mortgagor when a mortgagee fails to effect a release of a deed of trust mortgage in a timely manner. The statute is remedial. It seeks to provide a remedy for wrongs which may be occasioned and encourage lenders to effect a release of mortgages when a debt has been satisfied in order to allow a clear title in favor of the mortgagee. The statute serves a beneficial purpose. The fact that courts have characterized the statutorily prescribed damages as a penalty does not change the statute to one that is penal in nature and, therefore, automatically call for a strict construction. The statute is remedial. It should be liberally construed. Cases holding to the contrary are out of sync and have failed in distinguishing ordinary problems in nomenclature, i.e. penalty provisions in statutes providing for civil remedies are not necessarily penal statutes. To the extent that case authority exists and has held that ' 443.130 is a penal statute, it is respectfully submitted that they are wrong.

As earlier stated, even assuming that the Missouri Supreme Court were to hold that ' 443.130, R.S.Mo., is a penal statute requiring strict construction, Beverly Lines remained entitled to recovery in any event and the order of the trial court in granting summary judgment under the facts in this case was erroneous and should be reversed.

In order to qualify for recovery under ' 443.130, Beverly Lines must have been able to prove the following as required by the statute:

- (1) Submission of request in the form of a demand letter;
- (2) Delivery of the demand letter to the mortgagor (Mercantile Bank) by certified mail, return receipt requested;

- (3) Inclusion of evidence within the letter that the debt had been satisfied;
- (4) Advancement of the expense of recording a deed of release;
- (5) Failure on the part of Mercantile to deliver or record a deed of release within fifteen (15) business days following its receipt of the demand letter.

The documents attached to plaintiffs= petition and which were before the trial court at the time of its ruling on Mercantile=s motion for summary judgment substantiated the elements outlined above as follows:

- (1) A demand letter was submitted on December 2, 1999.
- (2) The demand letter was received by Mercantile Bank via certified mail, return receipt requested, on December 3, 1999.
- (3) The letter included a copy of the ASettlement and Mutual Release Agreement@ dated November 30, 1999, which substantiated satisfaction of the indebtedness by reason of mutual relinquishment of claims for damages and other property interests.
- (4) A check in the amount of \$27.00, which in fact exceeded the cost of the recording fee, was enclosed with the letter and was cashed by Mercantile. (L.F. p. 96 - Affidavit of Linda Montgomery, Recorder of Deeds.)
- (5) No deed of release had been provided to Beverly Lines or recorded within fifteen (15) business days of the bank=s receipt of the letter.

The only way in which Mercantile Bank would have been entitled to defeat Beverly Lines= claim for damages via its summary judgment motion would have been by virtue of its establishing as a matter of undisputed material fact that one or more of the foregoing elements had not been satisfied. Mercantile bank did not do so. Its summary judgment motion instead sought from the trial court, initially, strict construction

of the statute and, secondarily, a convoluted interpretation on the part of the trial court of the elements which must have been satisfied in the form of a legal conclusion to the effect that a settlement is not final and enforceable until every single unilateral act that may be performed in the implementation of the settlement (obtaining entry of the order of dismissal with prejudice of the underlying suit) was performed. Additionally, Mercantile advanced other contorted interpretations of the following: (1) when a debt is actually satisfied; (2) authority of counsel of record to effect settlement; (3) lack of signature of Beverly Lines on the demand letter; (4) lack of reference to the statute in the demand letter, and; (5) the meaning of the term *Agood funds*.

Approving the decision of the trial court in sustaining the motion for summary judgment of Mercantile, and by implication, supporting the argument and reasoning asserted by Mercantile Bank, would result in a host of scenarios, ranging from the ridiculous to the sublime, which would afford a mortgagee a right to refuse to release a deed of trust after the debt which it secured had been satisfied, e.g.:

- (1) A bank claims no satisfaction until a note has been marked *Apaid*,
- (2) A bank claims no satisfaction when there is a delay in performance by some third party indemnitor;
- (3) A bank fails to acknowledge satisfaction because of a wrongful failure by its agent and third party drawee to honor and clear a draft or cashier's check;
- (4) A bank fails to honor and acknowledge satisfaction of a debt determined by a court of competent jurisdiction in a final order to be absolved, satisfied or non-existent;
- (5) A bank refuses to acknowledge satisfaction when the agreed upon medium of exchange of consideration or *Afunds* is submitted in what turns out to be devalued greenbacks,

pesos, dinero, Deutschmarks or, for that matter, pre-paid passes to a local sporting event.

The trial court in this case determined that there had not been full satisfaction of the debt which secured the deed of trust prior to the time the demand letter was submitted because the court had not signed the dismissal of the suit which had caused the debt to be satisfied via the settlement agreement. Another way to respond to the error of this reasoning is to endeavor to answer the following question: What more could Beverly Lines or any other person within the Lines Group, or their attorney, have done after November 30, 1999, to make the settlement any more binding?

The only answer that fits within any realm of reason or within any concept of strict interpretation would be the following: Wait! Then the question becomes: How long, and for what? The settlement was final and enforceable no later than November 30, 1999. In fact, it was legally enforceable on October 27, 1999; the date the settlement offer was accepted by the bank's attorneys. Under no circumstances after November 30, 1999, can it be properly suggested that there was anything further that Beverly Lines needed to do or, in reality, needed to wait for.

The demand letter was submitted two days after all consideration and exchange of value had been provided by Beverly Lines in this case. Thereafter, the bank had fifteen business days, three full weeks, to fulfill its obligations under both the terms of the settlement agreement, and in order to comply with the statutory demand letter of December 2, 1999. To conclude that the bank should have been allowed more time is to conclude that a mortgagee is entitled to an open-end rule of accommodation standard that is not embodied within the statute. Three weeks is more than enough time for any bank or other party to complete a duty which it has previously acknowledged it is required to fulfill.

Another aspect of the error of the trial court in sustaining the summary judgment motion of

Mercantile Bank should be mentioned. The trial court obviously looked beyond the terms of the *Settlement and Mutual Release Agreement* in endeavoring to consider when satisfaction, or as the term was used by the trial court, *full satisfaction*, of the underlying indebtedness had been provided. Mercantile Bank vigorously argued that the satisfaction of the indebtedness could not have occurred until the bank representatives and the bank's attorneys signed the *Settlement and Mutual Release Agreement* in the spaces provided for their signatures when the final documentation was submitted to attorney for Beverly Lines. Why Mercantile Bank or its attorneys chose not to sign the documents on November 30, 1999, or for several days thereafter, is of their own concern.

The *Settlement and Mutual Release Agreement* did not provide that it would become effective on the date of the last signature of some bank officer to the document which its attorneys had delivered for execution to Beverly Lines and others.

The trial court looked beyond the clear terms of the *Settlement and Mutual Release Agreement* in an effort to find another applicable target date for determining when the agreement was enforceable and the debt thereby satisfied. In doing so, the trial court violated a rule of law known as the parole evidence rule. As the Missouri Court of Appeals, Southern District, held in *Central Production Credit Assoc. v. Reed*, 805 S.W.2d 300 (Mo.App. S.D. 1991), the parole evidence rule is a rule of law and not of evidence, and evidence offered in violation of the rule must be ignored even if it is presented without objection. A decision must be made on an unambiguous writing alone.

There is one date in the *Settlement and Mutual Release Agreement*. That date is November 30, 1999. The document speaks to no other effective date. Considering evidence of some latter effective date because of other facts extraneous and apart from the writing itself constituted a violation of the parole

evidence rule and the court's reasoning was flawed on that basis alone.

II. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, MERCANTILE BANK, BECAUSE THE DEMAND LETTER SUBMITTED PURSUANT TO SECTION 443.130 INVOKED THE PROVISIONS AND SATISFIED ALL OF THE ELEMENTS OF THE STATUTE PRESCRIBING THE CONTENTS OF A DEMAND FOR A RELEASE OF A DEED OF TRUST, IN THAT THE PLAIN LANGUAGE OF THE STATUTE DOES NOT REQUIRE REFERENCE TO THE STATUTE ITSELF WITHIN ANY DEMAND LETTER, OR THE PROVISION OF LEGAL ADVICE TO A MORTGAGEE OR WARNING OF POSSIBLE CONSEQUENCES WHICH MIGHT BEFALL A MORTGAGEE UPON ITS FAILURE TO ACT TIMELY AND RELEASE A DEED OF TRUST IN RESPONSE TO A DEMAND LETTER. THE ENCLOSURE OF THE SETTLEMENT AND MUTUAL RELEASE AGREEMENT[®] WITHIN THE DEMAND LETTER CONSTITUTED PROOF OF THE SATISFACTION OF THE OUTSTANDING INDEBTEDNESS FOR WHICH THE DEED OF TRUST WAS GIVEN TO SECURE AND THEREBY, IN COMBINATION WITH OTHER ELEMENTS CONSTITUTING CONDITIONS PRECEDENT TO RECOVERY OF THE DAMAGES AUTHORIZED BY THE STATUTE, PROPERLY INVOKE THE STATUTORY REMEDY UPON THE FAILURE

OF MERCANTILE BANK TO PROVIDE OR RECORD A DEED OF RELEASE WITHIN FIFTEEN BUSINESS DAYS FOLLOWING ITS RECEIPT OF THE LETTER ON DECEMBER 3, 1999. FURTHER, THE EVIDENCE OF THE SATISFACTION OF INDEBTEDNESS EMBODIED WITHIN THE ASETTLEMENT AND MUTUAL RELEASE AGREEMENT^e ENCLOSED WITHIN THE DEMAND LETTER SATISFIED ALL OTHER SPECIFIC REQUIREMENTS EMBODIED WITHIN THE STATUTE FOR A GOOD FUNDS^e AND IDENTIFICATION OF MORTGAGORS, INCLUDING BEVERLY LINES, WHO WERE ENTITLED TO RECEIVE THE BENEFIT OF THE RELEASE OF THE DEED OF TRUST, OR ALTERNATIVELY, TO RECOVER THE STATUTORY DAMAGES FOR FAILURE TO RESPOND TIMELY TO THE DEMAND LETTER.

It has been suggested by the Southern District of the Missouri Court of Appeals that the demand letter submitted in this case was insufficient to allow for recover of the remedy provided with in ' 443.130.3 RSMo. More specifically, the Missouri Court of Appeals in its opinion stated that the plaintiff's letter of December 2, 1999 A did not invoke the penalty[@](page 6 of Missouri Court of Appeals Opinion) and that the demand letter requested nothing more than Acompliance with the [settlement] agreement[@]. It is submitted that the reasoning and determination made by the majority opinion of the Missouri Court of Appeals is incorrect.

The Missouri Court of Appeals failed to recognize that the enclosure of a copy of the ASettlement

and Mutual Release Agreement@within the demand letter was required in order to meet one of the elements set forth within the statute as a condition precedent to recovery, i.e., Athe letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied . . .@ ' 443.130.2 RSMo. The ASettlement and Mutual Release Agreement@constituted proof of the satisfaction of the debt which the deed of trust was given to secure. That was the reason it was enclosed in the demand letter.

Any suggestion that there was something more required such as reference to the statute itself within the body of the demand letter, or legal advise to Mercantile Bank of the potential effect of its failure or refusal to respond timely is in essence reading something into the statute which is not apparent, and grafting on to the statute, by judicial decision, language which is not within the statute itself.

The statute does not require that a person making demand under the statute for a release of a deed of trust provide a legal citation to the statute and legal advise to a mortgagee of consequences for failure to act timely. Had the legislature intended that a demand letter do so, it could have made provision for it in the statute.

It has long been the rule that the wording of a statute is controlling, and when the language is unambiguous, a court is afforded no room for its construction. *Brownstein v. Rhomberg-Haglin & Associates*, 824 S.W.2d 13 (Mo. 1992). In *Spradlin v. City of Fulton*, 982 S.W.2d 235 (Mo. 1998) the Missouri Supreme Court stated the rule that a court must give effect to the language of a statute as written and that Athere is no room for construction even when a court may prefer a policy different from that enunciated by the legislature.@ (*Spradlin v. City of Fulton* at page 261)

To the extent that Mercantile Bank or the Southern District Court of Appeals believes that it would be more fair for a demand letter submitted pursuant to ' 443.130 RSMo. to include a reference to the

statute itself and perhaps a delineation of the possible consequences upon its failure to comply with the statutory duty, such desires should be ignored. The statute is not ambiguous and such interpretations are in violation of general rules regarding application and construction of statutes passed by our legislature.

Further, as indicated by the dissenting opinion of Judge Shrum of the Missouri Court of Appeals, Southern District, all persons in Missouri are conclusively presumed to know the law and banks should be given no dispensation from the rule.

It has also been asserted that the demand letter did not enclose sufficient proof that the debt secured by the Deed of Trust was satisfied with *Agood funds*. This issue was addressed in the brief of plaintiff in support of its objection and response to Mercantile's motion for summary judgment (legal file 101 thru 109 at page 104).

The legislature did not define the term *Agood funds*. The argument asserted before the trial court by Mercantile Bank was that the term *Agood funds* must necessarily mean money or form of money. Had the legislature intended for a mortgagor to enclose a cashier's check, greenbacks, letter of credit, or some other form of *Amoney*, it could have said so.

The term *Afund* is defined, in pertinent part, in Black's Law Dictionary, 5th Edition, West Publishing, 1979 as follows: *AFund . . . an asset or group of assets set aside for a specific purpose . . . a generic term and all-embracing as compared with term 'money', etc., which is specific. . . in the plural, this word has a variety of slightly different meanings, as follows: monies and much more, such as notes, bills, checks, drafts, stocks and bonds, and in broader meaning may include property of every kind.*

A claim or right to assert a cause of action is a property interest which a person may not be denied or deprived of without due process of law. Beverly Lines agreed to have her claims (property interests)

asserted against Mercantile Bank dismissed without prejudice and provided a stipulation and an order so that matter could be accomplished by Mercantile. The *Settlement and Mutual Release Agreement* and accompanying settlement documents compromised and absolved Mercantile of outstanding claims for damages, thus giving up a property interest of Beverly Lines. The *Settlement and Mutual Release Agreement* constituted not only the good and sufficient evidence that the debt secured by the deed of trust was satisfied, but also satisfied the term *good funds* as required by the statute. To hold otherwise under the circumstances in this case would be altering the plain meaning and plain language of ' 443.130 RSMo. In construing the predecessor to ' 443.130, the Missouri Supreme Court held in *Verges v. Giboney*, 47 Mo. 171 (1870) that it made no difference to the right to relief under the statute whether the payment was received voluntarily or through the *machinery of the courts*.

The forgoing equally applies to any claim on the part of Mercantile that the demand letter is ineffective for Beverly Lines to be able to obtain the relief sued for because of the asserted lack of her signature on the letter. The statute does not require that the demand letter be signed. Ordinarily, one would expect that a letter would be signed. However, there is no statutory requirement in this case that the demand letter be signed. In any event, the demand letter bears her name in the letterhead. The handwriting on the letter is that reflecting the signature of her now deceased husband, Laurence E. Lines. Beverly Lines was just as much a mortgagee entitled to have the demand submitted as was her husband, Laurence E. Lines. The letter bears both of their names in the letterhead.

A signature is defined in the Uniform Commercial Code adopted in Missouri, particularly, at ' 400.3-401 (b) RSMo. which provides that a signature may be made manually or by means of a device or machine, or by the use of any name, including a trade or assumed name, or by a word, mark, or symbol

executed or adopted by a person with intention to authenticate a writing. The Uniform Commercial Code Comments pertaining to ' 400.3-401 at paragraph 2 are further instructive in this regard and provide as follows: AA signature may be handwritten, typed, printed or made in any other manner. It need not be subscribed, and may appear in the body of the instrument as in the case of >I, John Doe, promise to pay . . .= without any other signature.@

Utilizing the definition of what constitutes a signature provided within the Uniform Commercial Code, it is clear that Beverly Lines name which was stated in the letterhead of the demand letter would in and of itself constitute her signature.

Again, application of the foregoing analysis is required only if the court assumes that signature to a demand letter is required by ' 443.130. The Statute does not provide for such. It would seem appropriate that a mortgagee should be informed of the names of its mortgagors who might be demanding release of a deed of trust. The demand letter clearly satisfied this requirement as it listed both the names of Laurence E. Lines and Beverly J. Lines. It also described the property and referenced the book and page number of the recorded deed of trust mortgage which was to be released.

CONCLUSION

The judgment of the trial court granting summary judgment in favor of Mercantile Bank should be reversed. In addition, the case should be remanded to the trial court with directions to sustain the motion for summary judgment of Beverly Lines. In reviewing this matter *de novo*, the Missouri Supreme Court should be able to determine, as well as any trial court, the appropriate result which should have been obtained in this case and enter a directive to that effect in the interest of judicial economy, i.e. that the summary judgment motion of Beverly Lines should be granted, without the parties to this action having to

expend additional resources on what in fact should be a foregone statutory conclusion under the facts of this case.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on the ____ day of December, 2001, the original and ten true and correct copies of the foregoing Appellants Substitute Brief, together with a floppy disc containing the brief as required by Rule 84.06 (g) was submitted to offices of Federal Express in Springfield, Missouri on the 6th day of December, 2001 for overnight delivery to the Clerk of the Supreme Court of the State of Missouri, 207 W. High St., Jefferson City, Missouri 65101 and on the same date one copy of the brief and a copy of the disc as required by Rule 84.06 (g), were placed in the United States mail addressed to attorney for respondent, **John L. Mullen**, Franke & Schultz, P.C., 911 Main Street, Suite 1312, Kansas City, Missouri, 64105.

Thomas W. Millington

Certificate of Compliance of Rule 84.06 (c)

The undersigned hereby certifies to the court as required by Rule 84.06(c) that the foregoing brief being submitted to the court pursuant to Rule 84.06(b) that: (1) Information included within the brief complies with the requirements of Rule 55.03; and (2) The brief complies with the limitations contained in Rule 84.06(b) in that the brief contains 682 lines of monospaced type.

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