

**IN THE SUPREME COURT OF THE  
STATE OF MISSOURI**

MARY ETHRIDGE	)	
	)	
Respondent / Plaintiff	)	Sup. Ct. No. SC87734
	)	App. Case No. SD 27016
v.	)	
	)	
TIERONE BANK, N.A.	)	
	)	
Appellant / Defendant	)	

SUBSTITUTE BRIEF OF APPELLANT TIERONE BANK, N.A.

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I. Statement of Grounds on Which Jurisdiction of Court of Appeals was Invoked

This action is a civil action involving a dispute as to the validity of a lien on certain real property located in Dallas County, Missouri. The trial court has entered what is now a final judgment in favor of Plaintiff Mary Ethridge, and against TierOne Bank (the “Bank”), finding and ordering that the Bank does not have a valid lien on the property. Appeal by the Bank of the trial court’s judgment is not prohibited by the constitution and is not limited in special statutory proceedings, and, accordingly, the jurisdiction of the Court of Appeals was properly invoked pursuant to V.A.M.S. §512.020(5). Following reversal and remand by the Court of Appeals, Mary Ethridge applied for transfer to the Missouri Supreme Court, which application was granted.

II. Statement of Facts

On August 6, 2001, Fidelity First Residential Lending, Inc. (“Fidelity First”) made a loan to David Ethridge, evidenced in part by that certain promissory note (the “Note”) in the original principal amount of \$100,000.00. Such loan was made by Fidelity First to David Ethridge in order to refinance existing indebtedness that was secured by a lien on the home of David Ethridge and his wife Mary, who is the Plaintiff in this case. [*see* Record on Appeal, (hereinafter, the “ROA”), p. 6-7, 20-21, 29-30, 94-97, 155-156, 159-160, 176, 179].

The Bank, which is the Defendant and Appellant in this case, is the holder of the Note and all other documents evidencing and/or securing the indebtedness owed thereunder (hereinafter, the “Loan Documents”). A Settlement Statement held by the Bank, executed as “Borrower” by both David and Mary Ethridge in connection with the loan, evidences how the loan proceeds from the First Fidelity loan were disbursed: to pay prior indebtedness owed on the prior mortgage debt in the amount of \$74,204.44; to pay taxes, penalties and costs owed by the Ethridges; and to deliver net proceeds to the Ethridges in the amount of \$15,754.17. [ROA, p. 7, 29-30, 48-49, 94-97, 155-156, 159-170, 176, 179].

When First Fidelity made the loan to David Ethridge, one of the Loan Documents that was signed and delivered to First Fidelity was that certain Deed of Trust dated August 6, 2001. The Deed of Trust was signed and delivered by both David and Mary Ethridge, who jointly owned the property (their home) to be encumbered thereunder. [ROA, p. 5-7]. The Deed of Trust was initialed by Mary Ethridge, on every page. [ROA, p. 95, 98, 156, 163-170, 180]. Mary Ethridge signed the Deed of Trust directly beneath the following language:

BY SIGNING BELOW, Borrower accepts and agrees  
to the terms and covenants contained in this Security  
Instrument and in any Rider executed by Borrower and  
recorded with it.

[ROA, p. 17, 30, 95, 97-98, 156, 170, 180]. Under the granting clause contained in the Deed of Trust, “Borrower” was the grantor of the lien on the property. At page 2, the Deed of Trust states as follows: “Borrower irrevocably grants, bargains, sells, conveys and confirms” the property to the trustee under the Deed of Trust. [ROA, p. 11, 97, 99, 156, 164]. The Deed of Trust contains a customary term of construction stating that singular terms in the Deed of Trust shall include the plural, and plural terms the singular. [ROA, p. 15, 99, 156, 168]. The Deed of Trust, at Section 13, also provides that “any Borrower who co-signs this Security Instrument but does not execute the Note (a “co-signer”): is co-signing this Security Instrument only to mortgage, grant and convey the co-signer’s interest in the Property under the terms of this Security Instrument ...” [ROA, p. 14, 29, 94, 97, 156, 167].

As noted, both David and Mary Ethridge signed and delivered the Deed of Trust on its final page, underneath language designating those who signed below as “Borrower.” By their signature, David and Mary Ethridge “accept[ed] and agree[d] to the terms and covenants contained in the Security Instrument ...” [ROA, p. 17, 30, 95, 97-98, 156, 170, 180].

Among such terms and covenants was a covenant of title, contained at page 2 of the Deed of Trust, which states:

**BORROWER COVENANTS** that Borrower is

lawfully seized of the estate hereby conveyed and  
has the right to grant and convey the Property ...

[ROA, p. 11, 33, 39, 156, 164].

Notwithstanding Mary Ethridge's execution of the Deed of Trust as "Borrower" on its final page, Mary Ethridge is not defined as "Borrower" on page 1 of the Deed of Trust. There, only David Ethridge, and not Mary Ethridge, is identified as the "Borrower" under the Deed of Trust [ROA, p. 10, 32, 34, 97, 100, 156, 163].

David Ethridge died on December 4, 2002; he was killed in an auto accident. No payments were made on the Note thereafter and a number of months later Mary Ethridge contended for the first time that the Bank did not have a valid lien on the home. [ROA, p. 6, 29, 31, 94, 95-96, 98, 156-157].

Mary Ethridge sued the Bank on August 5, 2003. [ROA, p. 1, 5]. In the course of the litigation, there has been no dispute that, with respect to the loan transaction, the intent was that the Bank would receive a lien on the home in order to secure the debt owed under the Note. In her Petition, at paragraph 7, Mary Ethridge stated that this was her husband's intent: "By instrument titled 'Deed of Trust' dated August 6, 2001, David Ethridge purported to convey to Fidelity First Residential Lending, Inc. a first mortgage lien on the above-described real estate." [ROA, p. 6]. Mary Ethridge then testified that she could remember little about the

actual loan closing but that she did whatever her husband David instructed her to do to carry out his intentions, that her intent coincided with his because he was the head of the household, and that she knew that his intent was to refinance the home mortgage. [ROA, p. 31, 74-75, 77, 82]. Mary Ethridge then stated in her summary judgment pleadings filed with the trial court that she “agrees that the intent (of the Deed of Trust) is obvious” [ROA, p. 206, 215], and that she is now contending that David Ethridge was the only one to grant a lien “only because” the originating lender made an error in defining “Borrower” at page 1 of the Deed of Trust. [ROA, p. 207, 215]. She also stated in her summary judgment pleadings that if she benefits in the end from this litigation, it would be as a result of the definitional error contained at page 1 of the Deed of Trust. [ROA, p. 200].

The parties filed cross motions for summary judgment. [ROA, p. 90, 171]. Mary Ethridge sought judgment as a matter of law on the basis that “Borrower” was the grantor under the Deed of Trust, “Borrower” was defined at page 1 of the Deed of Trust as David Ethridge and David Ethridge alone, and both David and Mary Ethridge had to sign the Deed of Trust as grantor in order to convey a valid lien for the benefit of the Bank. [ROA, p. 171-213, 229-241].

The Bank sought judgment as a matter of law on various bases, including: 1) that while “Borrower” was defined as David alone on page 1 of the Deed of Trust, both David and Mary signed as “Borrower” on the final page of the Deed of Trust,

creating an ambiguity in the Deed of Trust which, as a matter of law, is to be construed so as to preserve the intent of the Deed of Trust; and 2) that there was no dispute that the definition of “Borrower” on page 1 of the Deed of Trust was a mistake and that, accordingly, the mistaken provision was subject to reformation so that the intent of the parties would be carried out. [ROA, p. 90-170, 214-228].

The Bank also sought judgment as a matter of law under the doctrines of estoppel, equitable lien and equitable subrogation. With respect to estoppel, the Bank contended that Mary Ethridge should, years after the loan was made, be estopped from contending that only her late husband was the grantor, because such contention would render false the title covenant contained in the Deed of Trust, allowing her to reap a windfall resulting from such falsity. With respect to the imposition of an equitable lien, the Bank contended that, if the trial court denied the Bank relief on all of the legal bases set forth above, the trial court should grant the Bank an equitable lien because the intention of the parties in this case is clear from their conduct and dealings. Last, with respect to equitable subrogation, the Bank contended that, if the trial court denied the Bank on all of the legal bases set forth above, the trial court should place the Bank into the first lien position that was occupied by the previous mortgage lender just before the refinance was effectuated. [ROA, p. 29-46, 90-170, 214-228].

On April 22, 2005, the trial court granted summary judgment in favor of Mary Ethridge and against the Bank. The Court determined that its decision was bound by the controlling precedent of the Supreme Court of the State of Missouri, as set forth in Bradley v. The Missouri Pacific Railway Company, 91 Mo. 493, 4 S.W. 427 (Mo. 1886), which held that a party in whom title is vested must use appropriate words to convey the estate and that signing, sealing and acknowledging a deed by a wife, in which her husband is the only grantor, will not convey her estate. [ROA, p. 242-243].

### III. Points Relied On by the Bank On Appeal

The following are the points relied upon by the Bank in pursuing its appeal:

A. The trial court erred in granting judgment in favor of Mary Ethridge and against the Bank because the Deed of Trust contains an ambiguity with respect to whom the “Borrower” (and thus the grantor) was, and such ambiguity is, under Missouri’s canons of construction, to be resolved so as to preserve the intention of the parties and give effect to their intention.

#### ***Principal authorities upon which the Bank relies:***

Rathbun v. The Cato Corporation, 93 S.W.3d 771 (Mo.App.S.D. 2002);

City of Malden v. Green, 779 S.W.2d 354 (Mo.App.S.D. 1989);

Caniglia v. Nigro Corporation, 441 S.W.2d 703 (Mo. 1969);

Perbal v. Dazor Manufacturing Corp., 436 S.W.2d 677 (Mo. 1968).

B. The trial court erred in granting judgment in favor of Mary Ethridge and against the Bank because the Deed of Trust contained a drafting mistake which, under Missouri law, is subject to reformation so as to preserve the intention of the parties and give effect to their intention.

***Principal authorities upon which the Bank relies:***

Ethridge v. Perryman, 363 S.W.2d 696 (Mo. 1963);  
76 C.J.S., Reformation of Instruments, §§3, 4, 23, 25, 30.

C. The trial court erred in granting judgment in favor of Mary Ethridge and against the Bank because Mary Ethridge should be estopped from asserting that David Ethridge was the only grantor in that such assertion renders false the title covenant in the Deed of Trust, and in that she expressly accepted and agreed to such covenant of title.

***Principal authorities upon which the Bank relies:***

Board of Education of St. Louis v. County of St. Louis, 149 S.W.2d 878 (Mo. 1941).

D. The trial court erred in granting summary judgment in favor of Mary Ethridge and against the Bank because Mary Ethridge's declaratory judgment action is an action in equity and the equities do not lie in her favor, justifying the imposition of an equitable lien in favor of the Bank.

***Principal authorities upon which the Bank relies:***

Connell v. Jersey Realty & Investment Company, 180 S.W.2d 49 (Mo. 1944);

Wilkerson v. Tarwater, 393 S.W.2d 538 (Mo. 1965);

State Savings & Trust Company v. Spencer, 201 S.W. 967 (Mo.App.S.D. 1918).

E. The trial court erred in granting judgment in favor of Mary Ethridge and against the Bank on the basis of the Bradley decision because Bradley has limited application in that Bradley did not address any of the legal theories advanced by the Bank in this case, including ambiguity, mistake and reformation, estoppel, equitable lien, and equitable subrogation.

***Principal authorities upon which the Bank relies:***

Bradley v. The Missouri Pacific Railway Company, 91 Mo. 493, 4 S.W. 427 (Mo. 1886).

F. The Court of Appeals reversal of the trial court's judgment based on the doctrine of equitable subrogation was correct because it is consistent with the precedent set out in the decision of Anison v. Rice, 282 S.W.2d 497, 503 (Mo. 1955).

***Principal authorities upon which the Bank relies:***

Anison v. Rice, 282 S.W.2d 497, 503 (Mo. 1955);

Martin v. Nixon, 4 S.W. 503, 505 (Mo. 1886);

State ex rel. Baker v. Goodman, 274 S.W.2d 293, 297 (Mo. Banc 1954);

State Savings & Trust Company v. Spencer, 201 S.W. 967 (Mo.App.S.D. 1918).

G. The Court of Appeals ruled only with respect to two of the Bank's four points on appeal - "ambiguity" and "equitable subrogation" - and ruled it did not need to reach the issues of reformation or estoppel; thus, the Court of Appeals should consider the Bank's remaining two defenses.

IV. Argument

A. The trial court erred in granting judgment in favor of Mary Ethridge and against the Bank because the Deed of Trust contained an ambiguity with respect to whom the "Borrower" (and thus the grantor) was, and such ambiguity is, under Missouri's canons of construction, to be resolved so as to preserve the intention of the parties and give effect to their intention.

This point relied on involves an issue of law and is reviewable *de novo*.

Page 1 of the Deed of Trust identifies David Ethridge, but not Mary Ethridge, as the "Borrower." At the final page of the Deed of Trust, the Deed of Trust identifies those signing below as "Borrower" – and both David and Mary Ethridge signed there. Mary Ethridge initialed every page of the Deed of Trust. Further, Mary Ethridge signed the Settlement Statement as "Borrower." [ROA, p. 156, 161].

The Court of Appeals for the Southern District has stated, "contract language is not interpreted in a vacuum, but by reference to the contract as a whole." Rathbun v. The Cato Corporation, 93 S.W.3d 771, 778 (Mo.App.S.D.

2002). Examining the contract and the transaction as a whole, it is obvious that a mistake was made with respect to the definition of “Borrower” at page 1 of the Deed of Trust – even Mary Ethridge admits the definition was a mistake. She stated at the outset of the case, in her petition, that her late husband purported to grant a lien on the property under the Deed of Trust. [ROA, p. 6]. She testified that she attended the loan closing with him because she knew the house was being refinanced and that she “figured she would have to sign something” in connection with the loan. [ROA, p. 131]. She testified that her husband, as the head of the household, made the financial decisions on behalf of both himself and his wife. [ROA, p. 31, 74-75, 77, 82]. She testified that when her husband made such decisions, she acted in accordance with his instructions, so as to effectuate his intentions. [ROA, p. 74, 77, 82]. And she acknowledged, in her summary judgment pleadings, that she agreed that what was intended by the Deed of Trust was clear. [ROA., p. 206, 215].

Taking into account all of these factors – and not interpreting page 1 of the Deed of Trust “in a vacuum” – it is only logical to conclude that the seemingly contrary provisions in the Deed of Trust (by which David alone is identified as “Borrower” on page 1 and by which both David and Mary signed below language identifying them as “Borrower” on the final page) create an ambiguity in the Deed

of Trust. In turn, it is left to the Court “to ascertain the intention of the parties and to give effect to that intention.” Rathbun, 93 S.W.3d at 778.<sup>1</sup>

As noted, the intent of the parties to the transaction is not disputed – the loan transaction was intended to be a secured transaction, a refinance of the existing home loan with the debt owed to the Bank to be secured by a lien on the home. Mary Ethridge admits this – from the outset of the case, in her petition, she admitted that her husband purported to grant a lien on the home. And in subsequent pleadings, she has stated her agreement that the intent of the Deed of Trust is obvious, that she is seeking to void the Bank’s lien “only because” of the definitional error at page 1, and that if she reaps a benefit in this litigation, it will be as a result of First Fidelity “screwing up”<sup>2</sup> the draft of the Deed of Trust. [ROA, p. 200].

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<sup>1</sup> “The interpretation of a contract is a question of law, and the cardinal rule is to ascertain the intention of the parties and to give effect to that intention.” Rathbun, 93 S.W.3d at 778.

<sup>2</sup> These stark admissions by Mary Ethridge make clear that she is not seeking to avoid the Bank’s lien on the basis that there was no intent to grant a lien; instead, she is seeking to avoid the Bank’s lien in order to reap a windfall by seizing on a drafting error.

Accordingly, under the precedent of Rathbun, the trial court should have recognized the ambiguity in the Deed of Trust and given effect to the intent of the parties in entering into the Deed of Trust. Such a result was warranted not only under Rathbun but under various canons of construction set forth in Rathbun and in other Missouri appellate decisions through the years:

- ❑ “Where a contract is fairly susceptible to two constructions, one of which makes it fair, customary and such that prudent men would naturally make, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair or improbable contract.” Rathbun, 93 S.W.3d at 781.
- ❑ “The agreement should be given a natural and reasonable construction, one that the parties would, as reasonable men, be likely to make, rather than a useless contract resulting in no good to either party.” Caniglia v. Nigro Corporation, 441 S.W.2d 703, 712 (Mo. 1969).
- ❑ “Where an agreement is susceptible to two constructions, one of which renders the contract invalid and the other which sustains its validity, the latter construction is preferred.” Perbal v. Dazor Manufacturing Corp., 436 S.W.2d 677, 689 (Mo. 1968).

- “courts do not favor the destruction of agreements and will, if feasible, construe an agreement so as to carry into effect the reasonable intention of the parties. A contract should not be held void for uncertainty unless there is no possibility of giving meaning to the agreement.” City of Malden v. Green, 779 S.W.2d 354, 356 (Mo.App.S.D. 1989).

Such holdings are entirely consistent with this Court’s careful analysis of contract construction as set forth in Rathbun, and they warrant reversal of the trial court’s judgment in this case, which invalidated the Deed of Trust in its entirety and voided the Bank’s lien on the property.

The Court of Appeals ruled against the Bank on this point on appeal.

B. The trial court erred in granting judgment in favor of Mary Ethridge and against the Bank because the Deed of Trust contained a drafting mistake which, under Missouri law, is subject to reformation so as to preserve the intention of the parties and give effect to their intention.

This point relied on involves an issue of law and is reviewable by this Court *de novo*.

The doctrine of reformation seeks to achieve the same end as the canons of construction that are mentioned above – to carry out the true intent of the parties to a transaction, even in the face of a drafting error, in order to prevent a windfall to a party who may seek to take advantage of such an error. For instance, in Ethridge

v. Perryman, 363 S.W.2d 696, 703 (Mo. 1963), the Missouri Supreme Court addressed a deed of trust in which the legal description of the property to be encumbered was inaccurately drafted, containing only one of the three tracts of land that were to be subject to the lien of the secured lender. In that case, once the trial court determined the intention of the parties, it reformed the deed of trust to correct the mistake. On appeal, the Missouri Supreme Court affirmed the decision.

The Perryman decision is in accord with general hornbook law on reformation: “the purpose of reformation is to make an erroneous instrument express correctly the intention or the real agreement between the parties, or, in other words, its purpose is not to make a new contract or instrument, but to give effect to the original intent of both parties.” 76 C.J.S., Reformation of Instruments, §3. “[I]f the defendant admits the mistake, reformation is properly granted. So, where defendant admits that plaintiff’s version of the contract is the one that was intended by the parties at the time it was made, it is plain that there must have been a mistake in the reduction of their intention to writing, and the right to reformation is clear.” Id., at §23. “Equity looks to the substance, not to the form, of the transaction, and gives effect not to the mere words which the parties may have used but to their actual intention, and enforces the agreement which the parties really made ...” Id., at §30.

With the greatest respect to the trial court, the judgment entered in this case is not in accord with the fundamental tenets of the doctrine of reformation: the judgment does not result in the error in the Deed of Trust being corrected; the judgment does not result in the intentions of the parties being carried out; and the judgment does not enforce the agreement which the parties really made. For these reasons, the judgment entered by the trial court in this case should be reversed, and the intended transaction of the parties should be given effect.

The Court of Appeals did not reach this issue on appeal. (See Subsection G, page 33).

C. The trial court erred in granting judgment in favor of Mary Ethridge and against the Bank because Mary Ethridge should be estopped from asserting that David Ethridge was the only grantor in that such assertion renders false the title covenant in the Deed of Trust, and in that she accepted and agreed to such covenant of title.

This point relied on involves an issue of law and is reviewable by this Court *de novo*.

Mary Ethridge signed the Deed of Trust just below language that identified the signers as the “Borrower”:

BY SIGNING BELOW, Borrower accepts and agrees  
to the terms and covenants contained in this

Security Instrument and in any Rider executed by  
Borrower and recorded with it.

(emphasis added). By signing, Mary Ethridge accepted and agreed to the following term and covenant contained in the Deed of Trust: “BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby and has the right to grant and convey the Property ...”

Of course, the presence of this warranty, given by “Borrower,” is itself powerful evidence that any ambiguity regarding the identity of “Borrower” should be resolved such that “Borrower” is both David and Mary Ethridge – if one is to presume that the Ethridges were agreeing to the terms and covenants of the Deed of Trust in an honest manner and that, in turn, they intended that the covenant of title be honest and accurate, then the only rational conclusion is that “Borrower,” as used in the covenant of title, meant both David and Mary Ethridge. Conversely, Mary Ethridge’s current argument to the contrary renders the covenant false, the very covenant which she accepted, and to which she agreed, by signing the Deed of Trust. A more clear case for estoppel can hardly be envisioned.<sup>3</sup>

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<sup>3</sup> Under Board of Education of St. Louis v. County of St. Louis, 149 S.W.2d 878, 880 (Mo. 1941), “the essential elements of an equitable estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts ... inconsistent with those which the party

With the greatest respect to the trial court, the judgment entered in this case takes none of this into account. Mary Ethridge should be estopped from now, years after the loan was first made, taking a position that renders the covenant of title false. It places her late husband in the position of having made a false covenant, renders her acceptance and agreement of the covenant (contained just above her signature) false, and rewards her for such falsity.<sup>4</sup> For these reasons, the judgment of the trial court should be reversed, judgment should be entered in favor

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subsequently attempts to assert; (2) intention or at least expectation that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts.”

<sup>4</sup> Similarly, she should not be conferred with a windfall based on her current assertion that she can remember next to nothing and merely did whatever her late husband wanted. “The fact that one spouse customarily allows the other spouse to handle the business transactions of the couple is strong evidence that such an inference (of implied authority) exists.” Cohn v. Dwyer, 959 S.W.2d 839, 843 (Mo.App.E.D. 1997); Holtmeirer v. Dayani, 862 S.W.2d 391, 403 (Mo.App.E.D. 1993). Further, acceptance of benefits can bind a wife to the actions of her husband. Geraldine Enterprises, Inc. v. Johnson, 629 S.W.2d 494, 499 (Mo.App. S.D. 1981).

of the Bank, the Deed of Trust should be reinstated, and the Bank's lien should be recognized as valid.

The Court of Appeals did not reach this issue of appeal. (See Subsection G, page 33).

D. The trial court erred in granting summary judgment in favor of Mary Ethridge and against the Bank because Mary Ethridge's declaratory judgment action is an action in equity and the equities do not lie in her favor, justifying the imposition of an equitable lien in favor of the Bank or justifying subrogating the Bank to the position of the prior mortgage lender.

This point relied on involves an issue of law and is reviewable *de novo*.

Mary Ethridge's lawsuit, which sought a declaratory judgment adjudicating her and the Bank's respective rights in real estate, is an action in equity. Connell v. Jersey Realty & Investment Company, 180 S.W.2d 49 (Mo. 1944). While the Bank believes that Ms. Ethridge's claim may be resolved based on the legal principals set forth above, if it is not, then it is left to the Court to do equity in fashioning an equitable outcome to the case.

Regarding the imposition of an equitable lien, the Missouri Supreme Court has stated:

The doctrine of equitable lien applies only in cases where the law fails to give relief, and justice would suffer

without the equitable remedy ... [T]here must be an express agreement, or conduct by dealings of the parties from which an intention may be implied, that some specific property shall be appropriated as security for a debt or obligation before equity will consider that a lien should be declared on the property ...

From the foregoing statement of legal principles, it is apparent that the creation of an equitable lien contemplates a debt or obligation combined with an intention, express or implied, to appropriate certain property as security for the payment of the debt or obligation.

Wilkerson v. Tarwater, 393 S.W.2d 538, 541 (Mo. 1965).<sup>5</sup> In this case, there is no dispute regarding the existence of a debt or an intention to appropriate certain property as security for the repayment of that debt. Accordingly, even if the trial court was unwilling to determine – employing the canons of construction to resolve ambiguity, employing the doctrine of reformation, or finding that Mary Ethridge is estopped from seeking to invalidate the lien – that the Bank has a valid

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<sup>5</sup> Nothing in the opinion states the debt or obligation secured has to be a debt or obligation of the same person who is providing the lien.

lien on the property, the trial court should have impressed the property with an equitable lien in favor of the Bank. For this reason also, the judgment entered by the trial court is in error, and should be reversed.

Similarly, the Bank should be equitably subrogated to the position of the prior holder of the home mortgage loan. “Subrogation is usually granted: (1) where a person at the request of the debtor pays off the mortgage debt; (2) where one interested in the property pays off a mortgage to protect his own interest; (3) where a person stands in the relation of a surety to the debt and pays it off; and (4) in other cases where a denial of the right would be contrary to equity and in good conscience.” State Savings & Trust Company v. Spencer, 201 S.W. 967, 969 (Mo.App.S.D. 1918). Here, the prior mortgage indebtedness was paid, and it was paid by a refinancing lender seeking to protect its own interest (i.e., to acquire a first-priority lien on the property). Also, denial of the right of subrogation would be contrary to equity in that it would reap a windfall on Mary Ethridge and punish the Bank for a simple drafting error.

The Court of Appeals ruled in favor of the Bank on appeal with respect to the issue of equitable subrogation; this is the portion of the ruling addressed by Mary Ethridge’s application for transfer. (See Subsection F, page 28).

E. The trial court erred in granting judgment in favor of Mary Ethridge and against the Bank on the basis of the *Bradley* decision because *Bradley* has limited application in that *Bradley* did not address any of the legal theories advanced by the Bank in this case, including ambiguity, mistake and reformation, estoppel, equitable lien, and equitable subrogation.

This point relied on involves an issue of law and is reviewable *de novo*.

The judgment entered by the trial court did not address any of the Bank's legal arguments set forth above. Instead, the trial court cited the decision of the Missouri Supreme Court in Bradley, stated that the holding was controlling precedent in this case, and determined that it was bound by such precedent.

In Bradley, Lucy Price ("Lucy") was the owner of 80 acres of real property. In 1853, her husband Argillon signed a deed to the property to the Edwards. Edwards later deeded it to McCombs and McCombs deeded the property to the railroad. In 1875, Argillon died, and in 1877, Lucy died. In 1881, Lucy's heirs sued, contending that they should hold title to the property and that the property had never been properly conveyed.

The railroad defended in part based on the fact that Lucy had actually signed the deed by which Argillon conveyed the property to Edwards back in 1853. However, unlike in the case at bar, Lucy did not sign below specific language that identified her as a grantor. She signed beneath language that simply stated "in

testimony whereof, I have hereunto set my hand and seal.” Bradley, 4 S.W. at 428. Also, there was no covenant of title contained in the deed in Bradley, and Lucy did not expressly acknowledge and accept any such covenant, as Mary Ethridge did in this case (or, if there was such a covenant and acknowledgment, such covenant and acknowledgement were not discussed as part of the Bradley decision).

In addition, the railroad did not contend that the deed in Bradley was ambiguous in any way, and the court in Bradley was not required to resolve any alleged ambiguity therein. Further, the railroad did not assert that there was a mistake in the deed in Bradley – and did not seek reformation of any alleged mistake. Also, Bradley did not address any request for imposition of an equitable lien or for equitable subrogation.

The exact language of grant that was used in the deed in the Bradley case cannot be ascertained from the decision. What is clear from the decision is that the court did not believe there was any ambiguity with respect to exactly whom the grantor was or whom the grantor was intended to be – Argillon Price: “Signing, sealing, and acknowledging a deed by the wife, in which her husband is the only grantor, will not convey her estate.” Bradley, 4 S.W.2d at 428 (emphasis added).

Thus, with no such issue of ambiguity before it, with no need to resort to any canons of construction, with no contention of mistake before it, with no request for reformation before it, with no issue regarding the covenant of title before it, with

no issue of estoppel before it, with no claim for an equitable lien or conveyance made by the railroad, and with no other equitable relief requested by the railroad, the Bradley court made these simple determinations: that Lucy's mere signature and acknowledgment, without more, did not make the deed her grant; and that Lucy, as the person in whom title was vested at the time, had to use appropriate words in order to convey an interest in her estate. Bradley, 4 S.W. at 428.

In the judgment entered in this case, the trial court ruled that this case is “analogous to Bradley, and the Court is bound by the Bradley decision.” However, because Bradley addressed none of the issues presented by the Bank in this case, Bradley, in fact, is not analogous to the case at bar.

Bradley is certainly correct in its central holding to the effect that “the party in whom the title is vested must use appropriate words to convey the estate.” Implicit in the trial court's decision in this case, however, is a determination that the Bradley holding, applicable to deeds of conveyance, effectively trumps Missouri's canons of construction, the doctrine of reformation, the defense of estoppel, and the concepts of equitable lien and equitable subrogation, rendering all of the foregoing, and facts tending to establish them, irrelevant.

The better analysis is that the holding of Bradley is absolutely correct as a general proposition, and as a starting point, but may be complimented and affected by an analysis of whether a deed is ambiguous, whether a deed contains a mistake

subject to reformation, whether a party to a deed might be estopped from asserting a certain legal position years after it was executed, etc. In short, the holding in Bradley is a *starting point*; it is not a be-all, end-all, precluding a trial court from considering affirmative defenses that were not advanced in Bradley, precluding a trial court from ascertaining the true intent of the parties in the event of an ambiguity, or precluding a trial court from reforming an acknowledged mistake in a contract, even if that contract is an instrument of conveyance.

F. The Court of Appeals’ reversal based on equitable subrogation was correct because it is consistent with applicable precedent set out in Martin, Spencer and Anison.

Despite Mary Ethridge’s protests to the contrary, the cases cited in the Court of Appeals’ decision and in the Bank’s brief support application of the doctrine of equitable subrogation in this case; the Thompson case, cited by Ms. Ethridge in her brief and in her application for transfer to this Court, does not change this conclusion.

As noted by the Court of Appeals, the Missouri Court of Appeals – 120 years ago – held that, “the doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property

so intended to be mortgaged.” Martin v. Nixon, 4 S.W. 503, 505 (Mo. 1886). The later ruling of the Court of Appeals for the Southern District in Spencer (cited above) is consistent with Martin. And this Court has held:

The doctrine of subrogation applies to a great variety of cases, but no general rule can be laid down which will afford a test in all cases for its application, and whether or not it is applicable depends on the facts and circumstances of each case as it arises.

Anison v. Rice, 282 S.W.2d 497, 503 (Mo. 1955). In Anison, the Court addressed the doctrine of subrogation when Wilbur Rice negotiated for a loan and promised that he and his mother, Eliza, would pledge their jointly held property as security for the debt. The loan was obtained and prior indebtedness, secured by the property, was paid. Thereafter, Eliza refused to sign a deed of trust and claimed that Wilbur had no authority to act on her behalf in promising to grant the lien. Notwithstanding its finding that there was not sufficient evidence to find that Wilbur had authority to act on Eliza’s behalf, the Court held that the doctrine of equitable subrogation was applicable. Citing Section 162 of the Restatement of the Law of Restitution, the Court stated:

A court of equity may give restitution to the plaintiff and prevent the unjust enrichment of the defendant, where the plaintiff’s property has been used in discharging an obligation

owed by the defendant or a lien upon the property of the defendant, by creating in the plaintiff rights similar to those which an obligee or lien-holder had before the obligation or lien was discharged. In such a case the procedure is called subrogation, and the plaintiff is said to be subrogated to the position of the obligee or lien-holder. Although the obligation or lien has been discharged, the plaintiff can maintain a proceeding in equity to revive it for his benefit; in such a proceeding the court will create for the benefit of the plaintiff an equitable obligation or lien similar to that which was discharged.

Anison, at 503.

The equitable case for application of the subrogation doctrine is even greater in this case, where it is undisputed that David Ethridge intended to grant a lien on the property, where Mary Ethridge knew of David's intent, where Mary Ethridge attended the loan closing, and where Mary Ethridge signed the deed of trust at David's instruction. In Anison, Eliza appeared not to be involved at all, and a promise was made on her behalf by an unauthorized person; still, application of the doctrine was proper so as to prevent her from obtaining unjust enrichment. In the

case at bar, Mary was very much involved, appeared at the closing, signed the deed of trust, and initialed all of the pages thereof.

In the face of the clear authority cited above, Ms. Ethridge cites Thompson v. Chase Manhattan Mortgage Corp., 90 S.W.3d 194 (Mo.App. 2002). However, Thompson did not involve any unjust enrichment of a property owner by virtue of having a creditor pay a debt she owed (such as was the case in Anison and is the case here). Instead of being a property owner who benefited from payment of a debt she owed, the wife in Thompson was a creditor of her ex-husband (via a divorce judgment), with a judgment lien on property owned by him. A bank loaned money to the ex-husband to enable him to pay other lien creditors, then argued that it should be allowed to assume their lien priority positions, via equitable subrogation, ahead of the wife's lien position.

The Court of Appeals in this case easily distinguished Thompson. In Thompson, the ex-wife was not unjustly enriched by the refinancing bank being denied equitable subrogation. Since the divorce, she was not an owner, whose property would have been relieved of liens by use of the property of the refinancing creditor. She was a creditor, and the holder of a lien which the refinancing lender was seeking to prime. As noted by the Court of Appeals, "there is no doctrine better settled than that the language of judicial decisions must be construed with reference to the facts and issues of the particular case, and that the

authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to a decision.” Citing State ex rel. Baker v. Goodman, 274 S.W.2d 293, 297 (Mo. Banc 1954); Porter v. Erickson Transport Corp., 851 S.W.2d 725, 736 (Mo.App. 1993) [no prior decision is a precedent or implicates *stare decisis* when the facts are inapplicable].

In her transfer application, Ms. Ethridge seizes upon a particular line from Thompson, in which the Court of Appeals stated that subrogation “is usually allowed only in extreme cases bordering on it not reaching the level of fraud.” She then states, at various times in her application, “that there must be fraud or conduct bordering on fraud” (p. 4 of Application), that the requirement of fraud or something bordering on fraud “is the heart and soul of equitable subrogation” (p. 7 of Application), and that the Court of Appeals’ opinion therefore effectively overrules Missouri’s “well established law of almost 125 years” with respect to equitable subrogation (p. 4 of Application).

This argument utterly ignores the holding of this Court in Martin, which is 120 years old, and the holding of this Court in Anison, which is 51 years old. Martin contained no requirement that there be fraud or conduct bordering on fraud in a case involving an imperfect attempt to create a mortgage. Anison required no showing of fraud or conduct bordering on fraud in applying the doctrine of

subrogation.<sup>6</sup> In fact, what Mary Ethridge incorrectly describes as 125 years of “well established” jurisprudence appears to stem from an appellate decision from the Eastern District that is only 18 years old, Landmark Bank v. Ciaravino, 752 S.W.2d 923 (Mo.App.E.D. 1988). Like Thompson, Ciarvino involved a creditor’s attempt to subrogate to the position of a prior lienholder not to prevent unjust enrichment to a debtor / pledgor, but to obtain priority over a competing lienholder. In this context, the court, like the court later did in Thompson, did not allow for the application of equitable subrogation so as to defeat the lien position of an innocent third party. Thus, Thomson and Ciarvino are hardly the binding precedent that Ms. Ethridge argues them to be in this case. Anison is, and the Court of Appeals was correct in so holding.

G. The Court of Appeals ruled only with respect to two of the Bank’s four points on appeal - “ambiguity” and “equitable subrogation” - and ruled it did not need to reach the issues of reformation or estoppel; thus, the Court of Appeals should be directed to consider the Bank’s remaining two defenses.

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<sup>6</sup> Neither did Title Ins. Corp. v. United States, 432 S.W.2d 787 (Mo.App. 1968).

Neither did Williams v. Vaughan, 363 Mo. 639 (Mo. 1952). Neither did Boatman’s Bank of Cape Girardeau v. Evans, 715 F.Supp. 942 (E.D. Mo. 1988). None of the foregoing cases involved, or even mentioned, fraud as a required element for the application of equitable subrogation.

The May 11, 2006 opinion by the Court of Appeals was limited to a discussion of the Bank's Points on Appeal requesting a reversal of the trial court's judgment based on: (1) an ambiguity within the Deed of Trust; and (2) the doctrine of equitable subrogation. As noted by the Court of Appeals, the Bank also set forth Points on Appeal arguing grounds for reversing the judgment of the trial court based on reformation and estoppel that were not addressed by the Court of Appeals. In fact, the Court of Appeals stated that, if it were to address such points, it would likely reverse the trial court with respect to them:

We do not determine whether the issues relating to these affirmative defenses were correctly decided below. We would be remiss, however, if we did not point out that *Bradley* was the only authority upon which the trial court relied in granting summary judgment. It is difficult to discern how *Bradley* alone would defeat both of these affirmative defenses since reformation was not an issue in *Bradley*, the estoppel issue addressed therein involved facts radically different from the case at bar, and the trial court's judgment does not identify which essential elements of these affirmative defenses is lacking as a matter of law.

May 11, 2006 Opinion of the Court of Appeals, page 20, footnote 7.

The Court of Appeals should have addressed reformation and estoppel, since reversal on either of those issues would result in the Bank being afforded a lien for the entire amount of its debt, rather than the amount refinanced and owed to the prior creditor. Accordingly, any decision by the Supreme Court limited to the basis for the transfer application – the Court of Appeals’ decision with respect to equitable subrogation – would not wholly resolve the case as the lower court should consider of the Bank’s remaining affirmative defenses of reformation and estoppel.

V. Conclusion and Statement of Relief Sought

Mary Ethridge signed the Deed of Trust just below language identifying those signing below as “Borrower.” She initialed each and every page of the Deed of Trust. She signed other documents in connection with the closing, as “Borrower.” If not for the erroneous definition of “Borrower” at page 1 of the Deed of Trust, there would be no ambiguity in the Deed of Trust. However, there is an error in the definition at page 1 and, thus, there is an ambiguity. The correct legal result that follows, however, is not to declare the Deed of Trust and the lien thereunder as void *ab initio*. It is to adhere to “the cardinal rule,” which is “to ascertain the intention of the parties and to give effect to that intention.” Rathbun, 93 S.W.3d at 778. Here, the intention of the parties is undisputed – the intended transaction was a refinance of the Ethridges’ existing home mortgage, i.e., a

secured lending transaction. Not only does Mary Ethridge acknowledge this, but it is a matter of common sense, and is evident from the very existence of the Deed of Trust itself.

The definition of David Ethridge as “Borrower” on page 1 of the Deed of Trust was a mistake, a scrivener’s error. The legal result of such an error, however, is not to declare the Deed of Trust and the lien thereunder as void *ab initio*. It is to reform the document so as to carry out the intent of the parties: “a contract must be read according to the parties’ intent despite clerical errors and omissions.” Unlimited Equipment Lines, Inc. v. Graphic Arts Centre, Inc., 889 S.W.2d 926, 933 (Mo.App. 1994). Again, the intent of the parties is undisputed: First Fidelity made the loan and intended to receive a lien via the Deed of Trust; David Ethridge intended to refinance the existing home mortgage loan; and Mary Ethridge intended whatever her husband intended, and did as he instructed in order to carry out his intentions.

When Mary Ethridge signed on the last page of the Deed of Trust, she accepted, and agreed to, the covenants contained therein. Included among the covenants in the Deed of Trust was the covenant that the Borrower / grantor was lawfully seized of the estate conveyed by the Deed of Trust, and had the right to grant and convey the property. Today, years later, she has changed her position

and stated that she does not accept, and does not agree to, this vital covenant. She should be estopped from doing so.

Last, the Bank is entitled to an equitable lien or should be subrogated to the lien position of the prior home mortgage lender.

Accordingly, the Bank respectfully requests that:

- the Court determine that an ambiguity exists with respect to the identity of the “Borrower” in the Deed of Trust, order that the intent of the parties – that the Bank was to receive a lien to secure the indebtedness owed under the Note – be carried out, and that the Bank’s Deed of Trust be reinstated and remain of record as a valid lien in the office of the recorder of deeds of Dallas County, Missouri;
- the Court determine that the mistake in the definition of “Borrower” at page 1 of the Deed of Trust be reformed, such that “Borrower” is defined thereat as both David and Mary Ethridge, consistent with their signatures as “Borrower” on the final page of the Deed of Trust, and that the Bank’s Deed of Trust be reinstated and remain of record as a valid lien in the office of the recorder of deeds of Dallas County, Missouri;
- the Court determine that Mary Ethridge – by virtue of her acceptance of, and agreement to, the covenant in the Deed of Trust stating that the grantor thereunder was lawfully seized of title to the property and had the

right to convey and grant the property – be estopped from now contending that the only grantor under the Deed of Trust was David Ethridge, and that the Bank’s Deed of Trust be reinstated and remain of record as a valid lien in the office of the recorder of deeds of Dallas County, Missouri;

- the Court determine that the Bank is entitled to an equitable lien, effective as of the date of the Deed of Trust, and that such lien be recorded of record, effective as of the date of the recording of the original Deed of Trust, in the office of the recorder of deeds of Dallas County, Missouri;
- the Court determine that the Bank is entitled to be equitably subrogated to the lien position of the prior home mortgage lender on the property, and that the Court of Appeals decision in this regard be affirmed;
- the trial court’s injunction enjoining the Bank from foreclosing on the property be dissolved; and
- the Bank be entitled to monetary judgment in an amount equivalent to its fees and costs, including attorneys fees, incurred in protecting its interests in the property, including those fees and costs incurred in connection with this case and this appeal, as provided under Section 14 of the Deed of Trust [ROA, p. 156, 168].

Respectfully submitted,

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**CERTIFICATION PURSUANT TO RULES 84.06(b) AND 84.06(g)**

I, Brett Anders hereby certify that Appellant's Substitute Brief in the above-captioned matter filed on September 7, 2006 contains all information required by Rule 55.03; complies with the limitations imposed by Rule 84.06(b); and contains 8377 words according to the word processing system used to prepare it, and that this brief contains 874 lines of monospaced type according to the word processing system used to prepare it.

The undersigned further certifies that the disk enclosed herewith pursuant to Rule 84.06(g) has been scanned for viruses and that it is virus-free.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of Appellant's Substitute Brief was delivered via first class mail, postage prepaid and on this \_\_\_\_ day of September, 2006 to counsel for the Respondent via overnight delivery addressed to the following:

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