

**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 REPLY BRIEF OF APPELLANT TIERONE BANK, N.A.

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I. The Parties Do Not Disagree Regarding the Intent of the Transaction; Thus, Reformation is a Proper Remedy in This Case

As is made clear by Mary Ethridge's response brief (the "Response"), there is no dispute between the parties regarding their intent when David and Mary Ethridge signed and delivered the Deed of Trust in question: the intent of the parties was that the loan transaction would be a secured transaction, and that the Ethridges would grant the Bank's predecessor a lien on the property. *See*:

- page 4 of the Response: "The Deed was made for the purpose of encumbering the real estate jointly held by David and Mary Ethridge"; and
- page 6 of the Response: "... David Ethridge purported to convey to Fidelity First ... a first mortgage lien on the above-described real estate ...

Furthermore, as to her intent, Mary Ethridge has testified only that she did what she was told to do, that she deferred all decisions of the household to David Ethridge because he was the head of the household, and it is her belief that a wife is supposed to obey the decisions of the husband."<sup>1</sup>

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<sup>1</sup> To say that this is the "only" thing Mary Ethridge testified to is incorrect. She also testified to an additional critical fact, omitted from her Response: that she knew that David's intent was to refinance the home mortgage [ROA, pages 74-75, 77, 82]. Combine this fact with the facts that she deferred to his decision making and did what he told her to do, and his intent becomes her intent.

By the first statement, Ms. Ethridge has admitted the reason for the making of the Deed of Trust. By the second (together with her testimony cited in footnote 1), she has admitted what her husband's intention was (to refinance the home mortgage and grant a lien), and that her intention coincided with his because she let him make the decisions and then did as she was told.

Thus, the intent of the parties – to grant the lender a lien on the residence as part of the loan transaction – is undisputed. Accordingly, reformation of the mistaken portion of the Deed of Trust in order to effectuate this intent is proper: “[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.” 76 C.J.S., Reformation of Instruments, §23.

## II. Ambiguity; Resort to Parol Evidence is Proper

In the Response, Ms. Ethridge contends that construction of the Deed of Trust should be limited to the four corners of the document and that the Deed of Trust is free of ambiguity [p. 8 of the Response]. To support this argument, she asserts that the Deed of Trust is free of “duplicity, indistinctness or uncertainty.” She also argues that the Deed of Trust is free of ambiguity because nowhere does it promise one thing and then later take such promise away.

Careful examination of the argument contained at page 9 of the Response exposes the fallacy in Ms. Ethridge's argument. There, she contends: "Nowhere do the terms of the document make a reference to anyone other than David as the 'Borrower.'" Of course, this statement ignores Mary Ethridge's *own signature*, 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.

(emphasis added). Clearly, contrary to Ms. Ethridge's argument, the document *does* make reference to someone other than David as the Borrower.<sup>2</sup> Mary Ethridge signed directly below specific language that identified those signing below as the "Borrower." Years later, she wants no one to ask why, because that would entail resort to parol evidence – and her admission that it was the intent of the parties that the lender be granted a lien on the residence.

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<sup>2</sup> Ms. Ethridge argues that her signature is irrelevant to the determination of the identity of the "Borrower" and, thus, the grantor. However, under Missouri law, "a grantor's intent may be found *anywhere* in the deed, and that intention will prevail no matter where it may appear, provided it is not contrary to some positive rule of law." Thompson v. Chase Manhattan Mortgage Corporation, 90 S.W.3d 194, 203 (Mo.App. S.D. 2002) (emphasis added).

At page 9 of the Response, Ms. Ethridge goes on to argue: “the definition of Borrower is never changed or contradicted by the terms of the instrument.” This argument is incorrect: the very presence of Mary Ethridge’s signature as “Borrower” at page 8 of the Deed of Trust very much contradicts and implies that the definition of “Borrower” at Section B was in error.<sup>3</sup> And, indeed, Mary Ethridge has admitted that the definition at Section B, as far as it defined who was granting a lien to the lender, was in error. That admission is the very type of parol evidence that would result in the lien under the Deed of Trust being held to be valid, pursuant to Missouri law’s canons of construction. And that is precisely why Ms. Ethridge is now so fervently, but incorrectly, arguing that the Deed of Trust is free from ambiguity.

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<sup>3</sup> Ms. Ethridge contends that the typewritten definition of “Borrower” at Section B should be more determinative than her handwritten signature as “Borrower” at page 8. Actually, Missouri law states just the opposite: “handwritten provisions of a contract are to prevail over a printed portion if the two are in conflict.” Gilmartin Brothers, Inc. v. Kern, 916 S.W.2d 324, 330 (Mo.App. 1996).

Cases like Maries County Bank, Shaffner and Koehr<sup>4</sup> are of no avail to Ms. Ethridge. Maries County supports the basic premise that all of the correct grantors must sign a deed in order to make an effective grant to secure specific debt. The Bank does not contest the validity of that basic premise. However, the Bank does contend that the facts of the case at bar support a finding that the Deed of Trust is ambiguous and that its validity should be resolved by resort to parol evidence; the Bank further contends that, because the parties in this action agree what the intent of the transaction was, and that the document as drafted did not clearly effectuate that intent, the document is subject to reformation. These specific issues were not present in the three cases cited by Ms. Ethridge at page 10 of her Response.

Similarly flawed is Ms. Ethridge's argument at pages 11-12 of her Response that the Deed of Trust does not promise something in one place and then effectively take it away at another. Accepting Ms. Ethridge's construction of the Deed of Trust has that precise effect. At page 2 of the Deed of Trust, the lender is provided with a covenant that the grantor under the Deed of Trust "is lawfully

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<sup>4</sup> These cases are cited at page 10 of the Response. Maries County Bank v. Williams, 989 S.W.2d 269 (Mo.App.S.D. 1999); Shaffner v. Farmers Mutual Fire Insurance Company of St. Clair County, 859 S.W.2d 902, 907 (Mo.App.S.D. 1993); State ex rel Missouri Pacific Railway Company v. Koehr, 853 S.W.2d 925, 926 (Mo.banc 1993).

seized of the estate hereby conveyed and has the right to grant and convey the Property.” In turn, by her signature at page 8 of the Deed of Trust, Ms. Ethridge “accepted and agreed to the ... covenants contained in this Security Instrument ...” Years later, however, Ms. Ethridge urges a construction of the Deed of Trust that effectively takes from the Bank that very covenant, and her agreement to it. Because such a construction has the effect of taking away what the lender was given at page 2 of the Deed of Trust, the document is not free from ambiguity under Rathbun. In fact, the presence of the covenant is powerful evidence – taken from within the four corners of the document – that the parties intended that both David and Mary Ethridge be grantors, notwithstanding the erroneous definition of “Borrower” at Section B of the Deed of Trust.

Because of these obviously conflicting provisions, the Court is free to look to parol evidence – parol evidence that establishes exactly what was intended by David Ethridge and the lender, and parol evidence that establishes that Mary Ethridge knew what David intended, knew she would have to attend the closing, knew she would have to sign certain of the loan documents, and wanted to

undertake such actions as were necessary to enable David to carry out his intended transaction.<sup>5</sup>

At page 14 of her Response, Ms. Ethridge even goes so far as to argue that the originating lender made a “choice and not a mere drafting error,” implying that the lender’s drafting shortcomings were somehow by design. (This argument is presumably made in order to contend that the drafting error was not a mistake). However, common sense, not to mention the very presence of the Deed of Trust, dictates the conclusion that the lender intended to receive a lien to secure the loan it was making, and any argument that the originating lender intended not to receive an effective lien is without any rational basis.

Ms. Ethridge also asserts at page 14 of her Response that the Bank “desperately” wants the drafting error in the Deed of Trust to “be her fault.” Although no allegation of deception on the part of Ms. Ethridge has been made by the Bank; the Bank has pointed out that the net effect of Ms. Ethridge’s construction of the Deed of Trust would be to reap a windfall on her, i.e., to provide her ownership of the property, lien-free, on account of a drafting error when, at the same time, she fully acknowledges that what the parties intended was

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<sup>5</sup> It is this very set of undisputed facts that leads Ms. Ethridge to make her plea to the Court at page 13 of her Response that the Court “not take into consideration the parol evidence cited and offered by Appellant in its Brief.”

to enter into a secured lending transaction. Further, in seeking judicial resolution of the inconsistencies in the Deed of Trust, consistent with Missouri's canons of construction, the Bank is not saying that the drafting error at Section B of the Deed of Trust is Ms. Ethridge's fault. Nor is the Bank contending any fault on the part of Ms. Ethridge when it seeks reformation. It is merely attempting to obtain a ruling to the effect that the parties' admitted intent with respect to the transaction should be carried out.

Ms. Ethridge makes much throughout her Response of the fact that the originating lender was the party who made the drafting error in defining "Borrower" as it did in Section B of the Deed of Trust. However, human frailties are what give rise to ambiguities in documents and are what give rise to reformation cases, and the source of the error, for purposes of reformation, is irrelevant. Elton v. Davis, 123 S.W.3d 205, 212 (Mo.App.W.D. 2003) ["the source of the mistake, however, is not relevant in a suit for reformation; instead, the fact of the mistake empowers the court of equity to do so"]. Further, this Court has made it clear that the maxim of "construing against the drafter" does not take precedence over determining, and giving effect to, the true intent of the parties when possible. Rathbun v. The Cato Corporation, 93 S.W.3d 771, 778 (Mo.App.S.D. 2002) ["The rule espoused by the lessor is employed only as a last resort, when there is no evidence showing the parties' intent ... Here, there is no

need to resort to such an artificial rule of construction”]. Accordingly, Ms. Ethridge’s argument at page 15 of her Response, that the ambiguity should be construed against the Bank even when the intent of the parties is admitted, should be rejected.

III. Doctrine of Reformation is Applicable in This Case Notwithstanding Ms. Ethridge’s Arguments

At page 15 of her Response, Ms. Ethridge advances two arguments that reformation is not proper in this case. She argues that a) there was no preexisting agreement between herself and the originating lender and b) the originating lender had the ability to know the nature of the Ethridges’ interests in the property.

Ms. Ethridge’s contention that there was “no preexisting agreement” between herself and the originating lender ignores two undisputed facts: 1) there was an agreement made by David Ethridge to grant the lender a lien on the residence; and 2) she viewed David as the head of the household, she deferred to David in making the financial decisions, and she considered it her duty to do what he told her to do so that he could carry out the refinance. It is behind this cloak of deference that Ms. Ethridge now claims she never had an agreement to grant the

lender a lien. In fact, however, she did have such an agreement,<sup>6</sup> through her husband, whose judgment she trusted, to whom she left the family's financial decisions, and whose instructions (including to sign the Deed of Trust) she followed. Thus, the contention at page 17 of the Response that this combination of events "hardly rises to the level of a preexisting agreement between herself" and the originating lender could not be more incorrect.

Ethridge v. Perryman, 363 S.W.2d 696, 701-02 (Mo. 1963), which affirmed a lower court's decision granting reformation of a deed of trust, addressed this same argument, advanced by Myrtle Perryman in that case. Myrtle claimed that there was no preexisting agreement between her and the other party to the contract, i.e., that the "minds did not meet." Id. At 701. She based her argument on the fact that her husband handled all of the negotiations in advance of the deed of trust

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<sup>6</sup> Under Missouri law, it is not necessary for the agreement between the parties to be in writing, and such an agreement is found to exist so long as "the parties agreed to accomplish a particular object by the instrument to be executed ..." Morris v. Brown, 941 S.W.2d 835, 840-41 (Mo.App.W.D. 1997), citing Flaspohler v. Hoffman, 652 S.W.2d 703, 709 (Mo.App. 1983). Again, the "particular object" of the parties in this case is *undisputed*; David and the lender intended to enter into a secured lending transaction, i.e., to refinance the home, Mary knew this, and Mary did what David instructed her to do in order to carry out his intent.

being signed. Accordingly, she argued, reformation was not proper in the case. The court rejected the argument, noting that the Perrymans were husband and wife and “a wife by her actions and conduct may be estopped to deny her husband’s authority to act as her agent for her in her behalf.” The court found that it was “apparent that Myrtle Perryman entrusted the entire transaction to her husband” and that “when the deal was made he arranged for the parties to meet at the abstractor’s office to close the deal, and Myrtle Perryman appeared for that purpose.” By Ms. Ethridge’s own testimony in this case, her conduct uncannily parallels that of Myrtle Perryman in the Perryman case. Thus, the result should be the same as it was in Perryman – where Myrtle was estopped to deny her husband’s authority and was estopped to deny the existence of a pre-existing agreement.<sup>7</sup>

Ms. Ethridge’s second argument is that equity will not relieve a party when the party seeking equitable relief had the ability to determine the true state of things. In support of this argument, she cites three inapplicable cases. Thompson v. Chase Manhattan Mortgage Corporation, 90 S.W. 3d 194, 204-05 (Mo.App. S.D. 2002) addressed a party’s inability to obtain injunctive relief after the party

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<sup>7</sup> See also Cohn v. Dwyer, 959 S.W.2d 839, 843 (Mo.App.E.D. 1997) [the fact that one spouse customarily allows the other spouse to handle the business transactions of the couple is strong evidence that an inference of implied authority exists].

had made a mistake of law by not knowing the effect of a quit claim deed and by not recording a request for notice of a foreclosure sale. Cozart v. Mazda Distributors, Inc., 861 S.W.2d 347, 352-53 (Mo.App. S.D. 1993) addressed a party's inability to set aside a dismissal order once the trial court had lost jurisdiction to do so under the Missouri Rules of Procedure, and ruled that the party seeking relief had supported "only a claim of [its] unilateral mistake of law." S.G. Payne & Company v. Nowack, 465 S.W.2d 17, 20 (Mo.App. 1971) refused to afford relief to a party who was clearly informed that the information given to him was "nothing more than an opinion, or approximation," of a dollar amount and who chose to treat the approximation as gospel. The court, in refusing to invoke equity, emphasized that the case before it was "not a case of ... mutual mistake."

This case stands in stark contrast to the "mistake of law" cases cited in the Response. This is a case in which a portion of a contract (in this case, the definition of "Borrower" at section B and, thus, the identity of the grantors under the Deed of Trust) does not accurately reflect the agreement of the parties. It is not a case where a party mistakenly believed it was entitled to notice of a foreclosure sale even though it recorded no request for notice. It is not a case where a party was mistaken in its reading of the Missouri Rules of Procedure. And it is not a case where a party knowingly accepted a risk by relying on an approximation. Accordingly, cases like Perryman provide the appropriate precedent to be followed

in this case, not the “mistake of law” cases, none of which involved reformation, cited by Ms. Ethridge at page 18 of her Response.

#### IV. Equitable Estoppel

The Bank has contended in this case and on appeal that Ms. Ethridge should be equitably estopped from seeking a discharge of the lien on the home because the position she currently asserts renders false the covenant of title contained in the Deed of Trust. Ms. Ethridge acknowledges that adoption of her construction of the Deed of Trust renders the covenant false, but also asserts that this is not her problem – at page 21 of her Response she states that she did not “agree and accept the covenants contained within the Deed.” She makes this proclamation despite the fact that she signed the Deed of Trust directly below such an agreement and acceptance:

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). It is not logical to conclude that Ms. Ethridge, who executed the Deed of Trust just beneath language indicating agreement to and acceptance of the terms and covenants of the Deed of Trust, and who initialed each and every page of the Deed of Trust, did not agree to the terms and covenants of the document. Thus, her construction of the Deed of Trust is not only illogical, but it renders the document unusual, extraordinary, and of no utility. The Bank’s construction, on

the other hand, renders the Deed of Trust typical, and an agreement that ordinary persons would make. Under Missouri's canons of construction, it is the latter interpretation that is to be adopted by the Court. Rathbun, 93 S.W.3d at 781 ["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"]; Perbal v. Dazor Mfg. Corp., 436 S.W.2d 677, 689 (Mo. 1968) ["where an agreement is susceptible to two constructions, one of which renders the contract invalid and the other of which sustains its validity, the latter construction is preferred"].

V. Equitable Lien and Equitable Subrogation

Ms. Ethridge argues that the Bank should not be granted an equitable lien because such a lien can only be imposed if three elements are met, one being that there must be a duty or obligation owed from one person to another. The facts of the case, however, are undisputed: a) there was an obligation from one person to

another (David Ethridge to the Lender)<sup>8</sup>; b) there was a definite and identifiable *res* (the residence) to which the obligation fastened; and c) there was an intent that the property would serve as security for payment of the debt.

In addition, the cases cited in the Court of Appeals' decision and in the Bank's briefs wholly support the application of the doctrine of equitable subrogation in this case. Despite, Ms. Ethridge's attempts to narrow and limit the availability of the doctrine, in Anison v. Rice, 282 S.W.2d 497 (Mo. 1955), the Court held that:

The doctrine of equitable 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.

Id. at 503 (emphasis added).

Ms. Ethridge attempts to distinguish Anison from the facts of this case, and instead characterizes the decision as supporting the notion that “fraud” or

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<sup>8</sup> This obligation, in turn, extended to Mary Ethridge since David agreed he would pledge the property to the lender as security, David intended to pledge the property, Mary intended whatever David intended, and Mary signed and initialed the instrument of pledge, i.e. the Deed of Trust.

something bordering on fraud must be present before the doctrine of equitable subrogation may be applied. Again, in Anison, Wilbur Rice negotiated a loan and promised that he and his mother, Eliza, would pledge their jointly held property as security for the debt. Eliza subsequently refused to sign a deed of trust claiming Wilbur had no authority to act on her behalf in promising to grant the lien. Even though there was insufficient evidence for the Court to discern whether Wilbur did indeed have authority to act on Eliza's behalf, the Court found the application of equitable subrogation was proper.

Here, David Ethridge also promised that he would pledge property as security for a debt, property that was held jointly by he and his wife. Unlike Eliza though, Ms. Ethridge does not deny that her husband had authority to act on her behalf in promising to grant a lien. And unlike Eliza, Ms. Ethridge was present at the loan closing and she signed the deed of trust at David Ethridge's instruction. If the Court in Thompson, which Ms. Ethridge places so much reliance, characterizes the facts of Anison as "bordering on fraud," than clearly the facts of this case rise

to the same level, assuming fraud is indeed a requirement.<sup>9</sup>

In her Response, Ms. Ethridge attempts to distinguish Anison, by stating “the borrowers refused to do that which was promised would be done as an inducement to make the loan.” (emphasis added). In fact, it was not the borrowers, but only one co-defendant, Eliza, that refused to sign the deed of trust because she claimed to be unaware of the loan request and did not previously consent to pledging her property to secure the loan. Here, Ms. Ethridge admits to participating in the loan process and acknowledges the purpose of the deed of trust – to grant a security interest in favor of the Bank on the property held jointly by her and David Ethridge. The fact that Ms. Ethridge was aware and involved in the loan process further supports the Court of Appeals’ finding of equitable subrogation, even more so than in the facts of Anison.

Similarly, other cases Ms. Ethridge attempts to distinguish in her Response also support the application of equitable subrogation in this case. In Williams v. Vaughan, 253 S.W.2d 111 (Mo.banc 1952), the “injustice” cited by Ms. Ethridge is

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<sup>9</sup> Ms. Ethridge’s argument also ignores the fact that warranties were contained in the Deed of Trust assuring the lender that the grantor thereunder had the ability to grant the lien to the lender. By denying, years later, that she was not a grantor under the Deed of Trust, Ms. Ethridge has effectively rendered such warranty fraudulent or, at a minimum, as something bordering on fraudulent.

the lender's reliance on the guardian's representation that he had authority to procure loans on behalf of his ward. Accepting Ms. Ethridge's position that she did not grant a security interest in the property, it is no less an "injustice" to the Bank to now render false David Ethridge's representation that he had authority to grant and convey the property. In Boatmen's Bank of Cape Girardeau v. Evans, 715 F.Supp. 942 (E.D. Mo. 1988), the doctrine of equitable subrogation was held to apply even though there was no express or implied finding of "fraud." Likewise, in Title Insurance Corporation of St. Louis v. United States, 432 S.W.2d 787 (Mo. App. E.D. 1968) a finding of "fraud" was not discussed before applying the doctrine.

Though the Bank maintains that the courts' rulings on equitable subrogation have not established a requirement that fraud exist before equitable subrogation is proper, two final points are important to note. First, as noted above, the very position asserted by Ms. Ethridge results in a false covenant within the deed of trust and reaches no less a level of "fraud" or "injustice" than the Thompson Court and Ms. Ethridge allege to exist in Anison. Second, Ms. Ethridge can not dispute that the more recent decisions in Thompson and Landmark Bank v. Ciaravino, 752 S.W.2d 923 (Mo.App. 1998) involved factual circumstances much different than those currently before the Court. In both of those cases, one lien holder was attempting to advance or prime the lien position of another. In neither case was the

borrower arguing against the doctrine so that it could own its property free and clear of any lien whatsoever. Those cases solely determined which creditors were entitled to the superior lien position, thus enabling them to be paid first by the borrower.

Here, the Bank is not in dispute with another lien holder regarding a first lien position, but rather Ms. Ethridge is attempting to avoid any lien at all on the property. She expressly acknowledges the windfall which will result in her favor, but denies it reaches a level of “injustice” necessitating the application of equitable subrogation. Again, the facts are more in line with Anison, and the Court of Appeals’ finding of equitable subrogation was proper.

Ms. Ethridge is also in correct in asserting that equitable relief is not available to the Bank by virtue of the alleged maxim that a party’s negligence cannot be relieved when it had the ability to determine the true state of things. She cites to Thompson in support of this assertion. However, the “negligence” at issue, and its effect on the availability of an equitable remedy, must be considered in light of the facts of each case.

Again, in Thompson, the lender’s negligence related to a mistake of law in not knowing the effect of a quit claim deed and by not recording a request for notice of a foreclosure sale, a form of negligence that Missouri courts have not recognized as meritorious of equitable relief. In contrast, in the instant matter, any

“mistake” even potentially attributable to Appellant rises only to the level of a drafting error, to which the law specifically allows equitable relief under the doctrine of reformation. More important, Ms. Ethridge and David Ethridge also had the opportunity to determine “the true state of things,” as they read, signed and initialed the deed of trust on multiple pages. Ms. Ethridge now seeks to take advantage of her reading of the deed of trust and the drafting error contained therein, but nothing was said to correct the error at the time of the loan.

The maxim of “construing against the drafter” does not take precedence over determining, and giving effect to, the true intent of the parties. *See Rathbun v. The Cato Corporation*, 93 S.W.3d 771, 778 (Mo. App. 2002). “The source of the mistake, however, is not relevant in reformation, instead, the fact of the mistake empowers the court of equity to do so.” *Elton v. Davis*, 123 S.W.3d 204, 212 (Mo. App. 2003). Accordingly, Respondent’s allegation of negligence is not grounds for a reversal of the Court of Appeals’ application of equitable subrogation.

#### VI. The Impact of the *Bradley* Decision

The parties are in agreement that the Bradley<sup>10</sup> decision does not override or effectively preclude consideration of defenses such as ambiguity, reformation and equitable estoppel. Thus, the holding of Bradley – that appropriate words of grant must be used to convey the interest of both husband and wife – is a starting point,

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<sup>10</sup> Bradley v. Missouri Pacific Railway Company, 4 S.W. 427 (Mo. 1887).

not an end point. In this case, there is no dispute that the drafter of the definition of “Borrower” at the start of the Deed of Trust committed an error. If the Bank had asserted no affirmative defenses in this matter, Bradley would be dispositive with respect to the outcome of the case. However, because the Bank has shown that the Deed of Trust is ambiguous, the document must be construed according to Missouri’s canons of construction, and its validity upheld. Further, because the parties have agreed that a grant of a lien to the Bank was the true intention of the parties, reformation of the erroneous language is appropriate. Neither of these conclusions are barred by the decision in Bradley, and the trial court’s determination that it was required to follow Bradley and invalidate the Bank’s lien was therefore in error.

## VII. Conclusion

Ms. Ethridge contends in her Conclusion that her execution of the Deed of Trust “changed nothing.” By so stating, she effectively urges the Court to analyze this case in the exact same manner it would if she had not signed and initialed the Deed of Trust at all – to in essence pretend that a fact that exists in this case does not exist.

The fact of the matter is that Ms. Ethridge signed below language that identified those signing below as the “Borrower.” That changes something. The fact of the matter is that Ms. Ethridge agreed to and accepted the covenants

contained in the Deed of Trust, including the covenant of title contained therein. That changes something. The fact of the matter is that Ms. Ethridge initialed each and every page of the Deed of Trust. That changes something. The fact of the matter is that the Deed of Trust, signed by Ms. Ethridge, states that any non-maker of the underlying note co-signing the Deed of Trust was doing so in order to convey a lien on the property subject to the Deed of Trust. When Mary Ethridge co-signed a deed of trust containing such language, that changed something.

Consideration of these facts – all evident from the “four corners” of the document – gives rise to the natural question: Why did she sign and initial if the only grantor was really supposed to be David Ethridge? Why did she sign at the precise point in the document that identifies the signers as “Borrower”? Resort to parol evidence, which is undisputed in this case, provides the answers – answers Ms. Ethridge does not want this Court to even consider: the loan was intended to be a secured transaction; David’s intent was to refinance the home; Mary knew this was David’s intent; Mary left such decisions to David; Mary did what David instructed, so that he could carry out his intent; Mary attended the loan closing at David’s instruction; and Mary knew that she would be required to “sign something” in connection with the loan closing.

Contrary to Ms. Ethridge’s contention at page 45 of her Response, the Bank is not “shocked” that deeds can be rendered unenforceable by the use of

inappropriate or ineffective language. The Bank merely contends that ambiguities exist in the Deed of Trust at issue, and further contends that ineffective language in a contract is legally subject to reformation when there is no dispute as to what the parties truly intended. It respectfully hopes that this Court agrees.

Respectfully submitted,

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

The undersigned hereby certifies that Appellant's Reply Brief in the above-captioned matter filed on October \_\_\_\_, 2006: contains all information required by Rule 55.03; complies with the limitations imposed by Rule 84.06(b); contains 5548 words according to the word processing system used to prepare it; and contains 540 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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Christian J. Kelly

**CERTIFICATE OF SERVICE**

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

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