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FILED

FEB 23 2005

**THOMAS F. SIMON
CLERK, SUPREME COURT**

February 22, 2005

Clerk of the Supreme Court
State of Missouri
Post Office Box 150
Jefferson City, Missouri 65102

Re: Rodney Glass and Diane Glass, Respondents, vs. First National Bank of St. Louis, N.A.,
Appellant.
Missouri Supreme Court No. SC86408

Dear Clerk:

Pursuant to the Court's February 16, 2005 Order and your letter transmitting same, please let this letter serve as the "Letter Brief" of Respondents in this matter.

**LETTER BRIEF OF RESPONDENTS ADDRESSING ISSUES RAISED IN THE
AMICUS BRIEF OF THE MISSOURI BANKERS ASSOCIATION**

This letter brief addresses issues raised in the amicus brief of the Missouri Bankers Association ("MBA") which have not previously been addressed in Respondents' briefs.

I. MBA's policy argument is without merit.

In its brief, MBA argues that "[t]he financial world that gave rise to section 443.130 no longer exists." It then tries to use this unsupported statement to bolster its argument that section 443.130 should not be applied, notwithstanding its plain wording. This argument misses the point for a number of reasons. First of all, the version of the statute at issue in this case was last revised in 2004, having been amended previously in both 1994 and 1996. Moreover, the recent amendment to the statute continues to provide

for similar fines as an enforcement mechanism. In fact, the 1996 amendment reduced the amount of time for compliance from thirty days to fifteen days. Finally, as has been previously pointed out, a number of states continue to have statutes which are similar to RSMO section 443.130; many of these have larger fines. The reason for the continuing state policy of providing an enforcement mechanism such as exists in section 443.130 is that there is a pressing need for a mechanism to effect clear title on real estate within a reasonable time. This is important for consumer protection, the protection of title companies that indemnify subsequent lenders pending release of paid off encumbrances and for general need for marketability of title. If anything, today's financial world necessitates an interpretation of section 443.130 that gives effect to the legislature's clearly expressed intent rather than the impotent version the MBA would have this Court create.

II. MBA's amicus curiae brief fails to comply with the requirements of Rule 84.04.

An amicus curiae brief must comply with the requirements of Rule 84.04. Pine Lawn Bank and Trust Co. v. M.H. & H., Inc., 607 S.W.2d 696, 701 (Mo. App. E.D. 1980).

A. MBA's point relied on in its amicus curiae brief is entirely deficient, and it should be disregarded by the Court.

Rule 84.04(d)(1) provides that each point relied on shall:

- (A) identify the trial court ruling or action that the appellant challenges;
- (B) state concisely the legal reasons for the appellant's claim of reversible error; and
- (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

A point relied on must meet all three requirements. Such requirements are "not simply a judicial word game or a matter of hypertechnicality on the part of appellate courts." Crabtree v. Bugby, 967 S.W.2d 66, 72 (Mo. banc 1998) (citing Thummel v. King, 570 S.W.2d 679, 686 (Mo. banc 1978)). Where a brief is so defective that it "fails to give notice to this Court and to the other parties as to the issue presented on appeal . . . the point will be disregarded." J.A.D. v. F.J.D. III, 978 S.W.2d 336, 338 (Mo. banc 1998). MBA's only "Point Relied On" is: "THE JUDGMENT OF THE TRIAL COURT SHOULD BE REVERSED BECAUSE IT IS INCONSISTENT WITH SECTION 443.130, RSMO, AND THE STATE AND FEDERAL CONSTITUTIONS." This point relied on fails to meet each and every requirement of 84.04(d) and utterly fails to give notice to the Court and to the other parties as to what its contention is with regard to the judgment of the trial court.

1. *MBA's point relied on does not identify the trial court's ruling that MBA*

is challenging.

The Circuit Court granted summary judgment in favor of Respondents and against Appellant on Count I of their First Amended Petition for forfeiture of ten percent upon the amount of the security instrument in the amount of \$52,500.00. L.F. Vol. VI, p. 1194-97. The Circuit Court granted summary judgment in favor of Appellant and against Respondents as to any and all other damages claimed by Respondents in Count I, and as to Count II, III and IV of Respondents' First Amended Petition. L.F. Vol. VI, p. 1194-97. MBA's statement that "the judgment of the trial court should be reversed" gives no indication as to what action MBA challenges.

2. *MBA's point relied on fails to state the legal reasons why the trial court's judgment should be reversed.*

MBA's statement "because it is inconsistent with section 443.130, RSMo" is not a legal reason. Crabtree v. Bugby, 967 S.W.2d 66, 72 (Mo. banc 1998) (holding that "the assertion that the trial court erred 'because it did not follow the substantive law' does not set out an applicable rule of law. This merely repeats that the ruling was in error."). The point relied on does not properly state a violation of a constitutional right. J.A.D. v. F.J.D. III, 978 S.W.2d 336, 339 (Mo. banc 1998) (stating that "[t]o properly assert a violation of a constitutional right in a point relied on, an appellant must specifically identify the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself."). In fact, there is no reference to any article or section of either the Missouri or Federal Constitution in the entirety of MBA's brief.

3. *MBA's point relied on does not state or in any way explain why, in the context of this case, the purported legal reasons support the claim that the judgment of the trial court should be reversed.*

MBA's point relied on makes absolutely no reference to the facts or circumstances of the case. Even if MBA's statement "because it is inconsistent with section 443.130, RSMo" stated a legal reason, MBA's point does not provide any context whatsoever to explain why the legal reasons support a claim that the judgment should be reversed. MBA's point relied on does not even attempt to provide an explanation, in summary fashion or otherwise. Such "bare allegation of error . . . is wholly inadequate and preserves nothing for review." Crabtree v. Bugby, 967 S.W.2d at 72.

Additionally, MBA's point relied on is entirely vague and does not allow the Court or Respondents to identify what specific claim MBA is attempting to raise as a basis for reversing the trial court's judgment. J.A.D. v. F.J.D. III, 978 S.W.2d at 339. ("the point relied on is so nebulous that it is impossible to identify which of several possible claims appellant is attempting to raise . . . Inadequate points create a root problem: this Court

may interpret a contention differently than does the opponent or differently than was intended by the party asserting the contention. Thus review is limited to plain error.”).

- B. Any argument MBA attempts to raise in its point relied on that the trial court’s judgment is inconsistent with the State and Federal Constitutions is abandoned by MBA’s failure to support any such claim in the argument portion of its brief.**

MBA’s purported point that “the judgment of the trial court should be reversed because it is inconsistent with . . . the State and Federal Constitutions” is not supported, or even mentioned, in the argument portion of the brief, and the contention is therefore deemed abandoned presenting nothing for appellate review. Luft v. Schoenhoff, 935 S.W.2d 685, 687 (Mo. App. E.D. 1996).

- C. The argument portion of MBA’s brief fails to comply with Rule 84.04(e) in that it raises issues that are not raised in its point relied on, which, accordingly are beyond the scope of this Court’s review.**

The first sentence of the argument section of MBA’s brief restates its point relied on and states that the point relied on is shown by the briefs of Appellant. MBA’s second sentence states that it “wishes to set forth additional reasons for the Court to reject plaintiffs’ arguments.” Again MBA fails to identify what arguments it refers to when it asks the Court to reject plaintiffs’ arguments. In fact, nowhere in MBA’s brief is there any further reference to any argument of plaintiffs.

Moreover, MBA’s statement that it wishes to set forth additional reasons is in direct violation of Rule 84.04(e). Rule 84.04(e) provides that “[t]he argument shall be limited to those errors included in the ‘Points Relied On.’” “The scope of the issue for determination on appeal is that framed in the point relied on.” Rea v. Moore, 74 S.W.3d 795, 799 (Mo. App. S.D. 2002) (citing State v. Stringer, 36 S.W.3d 821, 822 (Mo. App. S.D. 2001)). MBA’s additional reasons are beyond the scope of its point relied on. There is no reference in MBA’s point relied on to (1) the financial world that gave rise to section 443.130; (2) whether section 443.130 should be strictly construed; or (3) to whether or not the plaintiffs are entitled to relief under section 443.130. This Court cannot pass upon issues not raised in MBA’s point relied on and raised for the first time in the argument portion of its brief. Berger v. Huser, 498 S.W.2d 536, 539 (Mo. 1973).

Furthermore, MBA’s argument section also fails to “include a concise statement of the applicable standard of review for each claim of error” as required by Rule 84.04(e).

- III. In addition to raising issues beyond the scope of its point relied on, the argument portion of MBA’s amicus curiae brief raises issues that were not raised by the pleadings or presented to the trial court and facts that are not included in and are not supported by the record, which cannot be considered**

by this Court.

- A. **The argument portion of MBA's amicus curiae brief raises issues that were not raised by the pleadings or presented to the trial court, which therefore cannot be considered by this Court.**

MBA's argument entitled "[t]he financial world that gave rise to section 443.130 no longer exists" and the issues presented thereunder were never raised in the pleadings, were not presented to the trial court, and were never raised by the parties in this case. Accordingly, this Court cannot consider MBA's argument. "Amicus cannot inject issues into a case not presented by the pleadings and the parties . . . Thus, this Court need not address the issues advanced by the amicus." Hemeyer v. KRCC-TV, 6 S.W.3d 880, 882 (Mo. banc 1999). Moreover, the financial world giving rise to § 443.130 RSMo is entirely irrelevant to whether Respondents are entitled to Appellant's forfeiture of ten percent upon the amount of the security instrument.

- B. **The argument portion of MBA's amicus curiae brief asserts statements of purported fact that are not included in and are not supported by the record in this case, which therefore cannot be considered by this Court.**

The argument portion of MBA's brief is replete with statements of purported fact that are not included in and are not supported by the record. Such purported facts cannot be considered by an appellate court because they are outside the record on appeal. Pretti v. Herre, 403 S.W.2d 568, 569 (Mo. 1966). Pursuant to Rule 83.08(a), "[t]he record on appeal filed in the court of appeals is the record in [the Supreme] Court." Except in specific circumstances, amici must comply with this principal just as any other party. Stanley v. City of Independence, 995 S.W.2d 485, 488 n. 2 (Mo. banc 1999) (recognizing that "Amici normally 'must accept the case as [they] find it.'" (citing Matter of Additional Magistrates, 580 S.W.2d 288, 293 (Mo. banc 1979))). The Stanley Court suggested that it is possible that amici may be able to raise points capable of judicial notice or relevant general studies and statistics. None of the purported facts presented by MBA are capable of judicial notice or are they general studies and statistics.

Paragraph 2 of the argument portion of MBA's brief (page 6 of MBA's brief), makes statements of purported facts regarding the MBA that are not in the record. None of the purported facts asserted in the section of MBA's brief entitled "The financial world that gave rise to section 443.130 no longer exists" are included in the record on appeal nor are they supported by the record in any way. In particular, none of the assertions of purported fact on pages 9 through 10 of MBA's brief are in the record or supported by the record. Moreover, these assertions are not capable of judicial notice or general studies and statistics. "The basic operative condition of judicial notice is the notoriety of the fact to be noticed. It must be part of the common knowledge of every person of ordinary understanding and intelligence." English v. Old American Insurance Company, 426

S.W.2d 33, 40-41 (Mo. 1968).

In addition to addressing issues not raised in MBA's point on appeal, MBA's argument section entitled "The Court should strictly apply section 443.130" includes purported facts and conclusory statements that are not in the record and not supported by the record in this case. For example, MBA states on page 11 of its brief that "the amount of the penalty in this case . . . is many times greater than the penalties envisioned by the General Assembly in enacting this statute." There is no evidence to support this assertion. It is pure conjecture.

MBA's assertion that plaintiffs did not have a cloud on their title (page 11 of MBA's brief) is belied by the facts of this case. On June 13, 2001, Respondents paid off their loan and deed of trust. The deed of release was not recorded until October 9, 2001. Black's Law Dictionary defines "cloud on title" as "[a]n outstanding claim or encumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and on its face has that effect, but can be shown by extrinsic proof to be invalid or inapplicable to the estate in question." BLACKS LAW DICTIONARY 175 (6th ed.1991). A cloud on title is precisely what resulted from First National Bank's failure to record the deed of release for Respondents' mortgage loan four months after Respondents paid off their loan and deed of trust. As thoroughly briefed in Respondents' appellate brief, any argument that First National Bank did all that it could to record Respondents' deed of release is irrelevant to whether the Bank complied with § 443.130, is not established by the facts of this case and is in fact contradicted by the testimony of Jennifer Poole in which she stated that it appears as if there was a mistake on Respondents' deed of release that prevented its recordation without correction by the Bank. L.F. Vol. IV, p. 690-91.

MBA goes on to make statements regarding plaintiffs' actions and First National Bank's purported efforts to file the deed of release on pages 12 and 13 of its brief, which are irrelevant to whether the Bank complied with § 443.130, contradicted by the record, and thoroughly briefed in Respondents' brief. Additionally, on page 13 of its brief, MBA inserts what appears to be a quotation from a St. Louis Post-Dispatch article. This information is not supported by the record in this matter, it is not a part of any record of evidence and it is not capable of judicial notice.

In addition to the fact that MBA's point relied on and argument portion of the brief fail to comply with Rule 84.04, none of the above referenced facts can be considered by the Court on appellate review because they are not supported by the record in this case and because they are not capable of judicial notice or other exception.

IV. In addition to MBA's failure to identify the arguments raised in the section of its argument entitled "The plaintiffs are not entitled to relief under section 443.130" in its point relied on, MBA fails to argue this point, thereby abandoning it.

In the third section of its argument entitled "The plaintiffs are not entitled to relief under section 443.130," MBA discusses the Garr case, which as MBA admits, has been

briefed by the parties. Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457 (Mo. banc 2003). MBA goes on to mention and cite to the more recent case of Brown v. First Horizon Home Loan Corp., 150 S.W.3d 287 (Mo. banc 2004), with absolutely no reference to or discussion of Brown as applied to the facts of this case. In addition to the fact that the applicability of the holding of Garr and/or Brown to the facts of this case are not identified as issues in MBA's point relied on, in MBA's discussion of Brown, it presents nothing to which to respond in that it does not even attempt to argue in what way Brown affects the case at hand. An argument that is not reasoned and merely states the state of the law is not preserved for appellate review and is deemed abandoned. Freeman v. Leader Nat. Ins. Co., 58 S.W.3d 590, 599 (Mo.App.E.D. 2001).

V. MBA's amicus curiae brief should be stricken from this case for failure to comply with the procedural requirements of Rule 84.05(f).

This case was transferred to the Supreme Court of Missouri by order dated November 2, 2004 of the Missouri Court of Appeals, Eastern District, Division Three. Neither Appellant nor Respondents filed a substitute brief in this case after it was transferred to the Supreme Court of Missouri pursuant to Rule 83.08(b). This case is set for oral argument on March 1, 2005.

On February 15, 2005, MBA filed its motion for leave to file amicus brief with its brief of amicus curiae, which adopts Appellant First National Bank of St. Louis, N.A.'s statement of facts and indicates it is filed in support of Appellant. Respondents did not consent to the filing of MBA's amicus curiae brief. On February 16, 2005 this Court sustained MBA's motion for leave and ordered its brief filed.

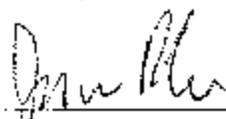
Respondents were not served with a copy of MBA's amicus curiae brief until February 17, 2005. Respondents were not allowed an opportunity to file an objection to the filing of MBA's amicus curiae brief pursuant to Rule 84.05(f)(3) prior to this Court's February 16, 2005 order sustaining MBA's motion for leave.

MBA's amicus curiae brief is filed beyond the time allowed pursuant to Rule 84.05(f)(2), which provides in pertinent part: "The brief shall only be filed if presented for filing within the time allowed for the filing of the brief of the party supported." Pursuant to Rule 83.08(c), after a case is transferred to the Supreme Court of Missouri, appellant may file a substitute brief within twenty days after the date of the order of transfer. Pursuant to Rule 84.04(f)(2), an amicus curiae brief "shall only be filed if presented for filing within the time allowed for the filing of the brief of the party supported." This case was transferred on November 2, 2004. MBA is well beyond the time in which Appellant could have filed a brief in this case.

CONCLUSION

For the foregoing reasons, MBA's amicus curiae brief is without merit. Indeed, for the foregoing reasons, it should be stricken from this case.

Sincerely,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing forwarded by U.S. Mail, postage prepaid, this 22nd day of February 2005:

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