IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

NO. ED 88183

SCOTT HUBER AND STEPHANIE HUBER,

Plaintiffs – Appellants,

v.

WELLS FARGO HOME MORTGAGE, INC. and FRANKLIN AMERICAN MORTGAGE COMPANY

Defendants – Respondents.

APPEAL FROM THE ST. LOUIS COUNTY CIRCUIT COURT
STATE OF MISSOURI
The Honorable Patrick Clifford
Associate Circuit Court Cause No.: 04AC-18522

BRIEF OF APPELLANTS SCOTT HUBER AND STEPHANIE HUBER

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JURISDICTIONAL STATEMENT

This appeal does not involve any of the matters over which the Missouri Supreme Court has exclusive jurisdiction pursuant to Article V, Section 3, of the Missouri Constitution, and, therefore, the Court of Appeals has jurisdiction by virtue of its general appellate jurisdiction.

STATEMENT OF FACTS

Appellants hereby submit the following as a fair and concise outline of the facts relevant to the questions presented for determination.

At all relevant times mentioned in the First Amended Petition, Appellants have owned the real estate and residential property located at 11805 Birmington Drive, Bridgeton, Missouri 63044 (the "Property"). (See L.F. 89). On or about September 12, 2002, Appellants executed a promissory note to Franklin in the principal amount of $110,500. (See L.F. 89).

The repayment of the promissory note to Franklin was secured by a deed of trust on the Property. (See L.F. 89). In or about October 2002, Wells Fargo purchased the said promissory note and deed of trust from Franklin. (See L.F. 90; see also Assignment of Rights listing Wells Fargo as mortgagee – L.F. 70; see also Franklin's Answer to First Interrogatory No. 17 admitting that the loan and servicing rights were "sold" to Wells Fargo – L.F. 73; see also Wells Fargo Payoff Certificate stating that Wells Fargo will process, prepare and forward the deed of release and reserving in Wells Fargo "all rights and remedies under the [original] Note and Security Instrument – L.F. 74; see also Wells Fargo Confirmation of Loan Payoff admitting that Wells Fargo is "committed to release the liens on loans it services" – L.F. 75; see also October 23, 2002 letter and attached Notice of Assignment from Wells Fargo to Appellants admitting purchase and transfer of loan from Franklin – L.F. 77; see also Wells Fargo Payment Letter, among other things, directing any questions to Wells Fargo and thanking Appellants for "using Wells Fargo" – L.F. 78; see also Wells Fargo Final Escrow Account Disclosure – L.F. 79).

On or about February 6, 2004, Appellants requested Wells Fargo to provide them with a payoff figure to pay their loan with Wells Fargo in full, which was provided by Wells Fargo at their request. (See L.F. 90). On February 6, 2004, the payoff amount was received by Wells Fargo and applied to Appellants' promissory note and loan obligation to Wells Fargo, which Appellants personally confirmed with Wells Fargo on February 6, 2004. (See L.F. 90). On March 4, 2004, Appellants sent a statutory demand letter to Wells Fargo demanding release of the deed of trust on the Property, and further that the deed of release be delivered in hand to them within 15 business days. (See L.F. 90; see also L.F. 81-83).

Appellants also enclosed and advanced with the demand letter a check, No. 3210, in the amount of $40.00, payable to Wells Fargo, for the expense and cost in filing and recording of the deed of release. (See L.F. 90; see also L.F. 81-83). Wells Fargo received the demand letter and check by certified mail, return receipt requested, on March 8, 2004. (See L.F. 90; see also L.F. 84-86).

On or about March 15, 2004, Appellants received a note from Wells Fargo returning the said check, No. 3210, with a note indicating, "Check number 3210 in the amount of $40.00 is being returned to you for the following reason: The loan is Paid in Full." (See L.F. 90; see also L.F. 93). However, Wells Fargo failed to send any deed of release to Appellants with the said March 15 letter. (See L.F. 91).

In fact, Wells Fargo, after actively ignoring Appellants' March 8, 2004 demand letter for 34 business days, finally sent correspondence to Appellants' counsel attaching a deed of release dated April 23, 2004 that **it prepared**. (See L.F. 91; see also L.F. 94).

Before April 24, 2004, Appellants were never informed by Wells Fargo that a deed of release had been filed with the St. Louis County Recorder of Deeds' office. (See L.F. 91). The first deed of release that Wells Fargo purportedly prepared and recorded in this case and dated February 23, 2004 does not even request that the recorders' office mail a copy of the release to Appellants following recording. (See L.F. 28).

In fact, the paperwork given to Appellants on or about February 6, 2004 by Wells Fargo following loan payoff advised Appellants that they should wait a "minimum of 90 days prior to contacting the county for a copy your release." (See L.F. 91; see also L.F. 74). The recorders' office is often unreliable, as set forth in Wells Fargo's own paperwork (L.F. 74-wait 90 days to contact them), and as indicated in an Affidavit from a bank in a related case wherein a deed of release was mailed to the St. Louis County recorders' office in August 2002 but was not recorded until December 2002, over 90 days later. (See L.F. 97, Affidavit from related case).

MO. REV. STAT. § 443.130 (2000) provides:

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

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

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

The statutory damages are $11,050.00. (See L.F. 91). Prejudgment interest at the rate of 9% per annum from the date of the demand letter to October 13, 2005 is $1,588.48. (See L.F. 91). Prejudgment interest is accruing at the per diem rate of $2.72. (See L.F. 91). Court costs incurred to date are $58.00 (filing fee and service fee). (See L.F. 91).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTED GENUINE ISSUES OF MATERIAL FACT REQUIRING A JURY TRIAL IN THAT MO. REV. STAT. § 443.130 (2000) REQUIRES PHYSICAL DELIVERY OF A DEED OF RELEASE TO APPELLANTS FOLLOWING DEMAND, AND RESPONDENTS' SOLE ACT OF RECORDING A RELEASE WITH THE RECORDER OF DEEDS DOES NOT MEET THE REQUIREMENTS OF THE STATUTE.

Brownstein v. Rhomberg-Haglin and Assoc., Inc., 824 S.W.2d 13 (Mo. 1992)

Dodson v. Clark, 49 Mo. App. 148; 1892 Mo. App. LEXIS 186 (Mo. Ct. App. 1892)

State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker, 955 S.W.2d 931 (Mo. 1997)

Wolff Shoe Co. v. Dir. of Rev., 762 S.W.2d 29 (Mo. 1988) (en banc)

MO. REV. STAT. § 443.130 (2000)

MO. REV. STAT. § 443.110 (2000)

II. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTED GENUINE ISSUES OF MATERIAL FACT REQUIRING A JURY TRIAL IN THAT WELLS FARGO WAS THE ASSIGNEE, OWNER AND SERVICER OF THE LOAN, AS WELL AS FRANKLIN'S AGENT, AND THEREFORE WELLS FARGO WAS THE PROPER PARTY TO RECEIVE THE STATUTORY DEMAND.

Bargfrede v. Am. Income Life Ins. Co., 21 S.W.3d 157, 161 (Mo. Ct. App. 2000)

MO. REV. STAT. § 443.130 (2000)

III. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTED GENUINE ISSUES OF MATERIAL FACT REQUIRING A JURY TRIAL IN THAT MO. REV. STAT. § 443.130 APPLIES TO THIS TRANSACTION REGARDLESS OF WHEN RESPONDENTS MAY HAVE FILED A DEED OF RELEASE WITH THE ST. LOUIS COUNTY RECORDER OF DEEDS OFFICE.

Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457 (Mo. 2004) (en banc)

MO. REV. STAT. § 443.060.01 (2000)

ARGUMENT

A. Introduction

This suit seeks the statutory damages associated with Wells Fargo's violation of MO. REV. STAT. § 443.130. Section 443.130 provides that any bank receiving satisfaction of a mortgage **shall deliver to the borrower** a sufficient deed of release within 15 business days following a proper demand. Should the bank fail to so deliver the deed of release, § 443.130 provides that the bank is **"absolutely"** liable for the sum of ten percent of the original amount of the mortgage plus any other damages sustained.[1] Wells Fargo has unequivocally admitted that it **did not** mail, forward or deliver to Plaintiffs a deed of release within 15 business days of the demand.

Wells Fargo filed a Motion for Summary Judgment below raising only three issues: (1) that it somehow satisfied the statute by filing the deed of release with the recorder of deeds, even though the plain language of the statute and its legislative history make clear that recording the release does not fulfill the statutory requirements; (2) the demand letter should have been served on Franklin American Mortgage Company ("Franklin"), not Wells Fargo, even though Franklin had previously sold, transferred and assigned the loan to Wells Fargo, who, in its own capacity as owner, assignee and transferee accepted payment from Plaintiffs, serviced all aspects of the loan, provided the loan payoff information, and accepted payment of the payoff from Plaintiffs, among other things; and (3) that a statutory demand letter, pursuant to MO. REV. STAT. § 443.130

[1] MO. REV. STAT. § 443.130 (2000) governs this action. (See L.F. 69).

(2000), can only be made upon property that is encumbered. Franklin merely adopted Wells Fargo's Motion for Summary Judgment below and raised no additional issues.

B. Standard for Summary Judgment

Summary judgment is a drastic and extreme remedy that cannot stand unless the record, viewed in the light most favorable to the party opposing the motion, shows that no question of material fact remains. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 380 (Mo. 1993) (en banc). Appellate review of summary judgment is *de novo*, and there is no need for the appellate court to defer to the trial court. Curnutt v. Scott Melvin Transp., Inc., 903 S.W.2d 184, 189 (Mo. Ct. App. 1995).

The reviewing court first determines whether there is any genuine issue of material fact requiring a trial and then determines whether the judgment is correct as a matter of law. J.R. Green Properties, Inc. v. Meixner, 778 S.W.2d 342, 343 (Mo. Ct. App. 1989). The moving party has the burden to show that it is entitled to judgment as a matter of law. Id.

A genuine issue of material fact exists where the record contains competent evidence supporting two plausible, but contradictory, accounts of material facts. Skaggs v. Aetna Life Ins. Co., 884 S.W.2d 45, 47 (Mo. Ct. App. 1994). Factual questions are held to exist if evidentiary issues are actually contested, are subject to conflicting interpretations, or if reasonable persons might differ as to their significance. Martin v. City of Washington, 848 S.W.2d 487, 492 (Mo. 1993) (en banc).

If there is even the slightest doubt concerning facts, a genuine issue exists precluding summary judgment. State Highway Com'n v. Keeley, 715 S.W.2d 338, 339 (Mo. Ct. App. 1986). This is because summary judgment tests solely for the existence, not the extent of genuine disputes. Meckfessel v. Fred Weber, Inc., 901 S.W.2d 335, 338 (Mo. Ct. App. 1995).

Here, the trial court incorrectly declared and misapplied the relevant law to the facts herein, and its Judgment and Amended Judgment (L.F. 135, 137) are not supported by the evidence and probative facts. Accordingly, this Court should reverse the trial court in all respects.

I. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTED GENUINE ISSUES OF MATERIAL FACT REQUIRING A JURY TRIAL IN THAT MO. REV. STAT. § 443.130 (2000) REQUIRES PHYSICAL DELIVERY OF A DEED OF RELEASE TO APPELLANTS FOLLOWING DEMAND, AND RESPONDENTS' SOLE ACT OF RECORDING A RELEASE WITH THE RECORDER OF DEEDS DOES NOT MEET THE REQUIREMENTS OF THE STATUTE.

Respondents contended below that their act of recording a deed of release on February 24, 2004 somehow satisfies the statute.[2] In fact, Respondents stated, "If [Plaintiffs] had merely checked the records of the Recorder of Deeds of St. Louis County, they would [have] determine[d] . . . that the Deed of Trust had been released." (See L.F. 22).

[2] The adequacy of Appellants' demand letter was not raised by Respondents with the trial court. As such, this issue has not been preserved for appeal. Alberswerth v. Alberswerth, 184 S.W.3d 81, 96 (Mo. Ct. App. 2006). Even if, however, this issue were preserved, Appellants' demand letter meets the requirements of the statute. See Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457 (Mo. 2004) (en banc); see also Glass v. First Nat'l. Bank of St. Louis, 191 S.W.3d 662 (Mo. 2006) (en banc) (distinguishing Garr and discussing requirements for a statutory demand letter).

Respondents did not review their own loan documents in this case. Specifically, Wells Fargo advised Plaintiffs on February 6, 2004 that Plaintiffs should wait a "minimum of 90 days prior to contacting the county for a copy your release." (See L.F. 74).

In addition, recording does not satisfy the statute. Section 443.130 provides in relevant part:

> If any such person, thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, **deliver** to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely . . . (emphasis added)

Respondents attempt to graft additional requirements into § 443.130 not intended by the General Assembly. Clearly, such an interpretation of the statute is based upon the biased self-interest of a giant lending institution that would benefit from the convenience of filing the Deed of Release with the county of record. Unfortunately for Respondents, § 443.130 requires that Respondents deliver the Deed of Release to the "person making satisfaction." Based upon the plain language of the statute, filing the Deed of Release with the St. Louis County Recorder of Deeds Office does not fulfill the requirement of § 443.130 that Respondents "deliver to the person making satisfaction a sufficient deed of release."

A. The Plain Language and Legislative Intent of MO. REV. STAT. § 443.130 Dictates That the Statute Can Only Be Satisfied By Respondents' Delivery of a Deed of Release to Appellants

The primary rule of statutory construction is to ascertain the intent of the General Assembly, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. Wolff Shoe Co. v. Dir. of Rev., 762 S.W.2d 29, 31 (Mo. 1988) (en banc). "Where the language of the statute is clear, a court should regard laws as meaning what they say; the General Assembly is presumed to have intended exactly what it states directly and unambiguously." State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker, 955 S.W.2d 931, 933 (Mo. 1997) (quoting In re Estate of Thomas, 743 S.W.2d 74, 76 (Mo. 1988) (en banc). Where the statutory language is unambiguous, no room is afforded for construction. Brownstein v. Rhomberg-Haglin and Assoc., Inc., 824 S.W.2d 13, 15 (Mo. 1992).

The starting point in statutory interpretation is always the plain language of the statute. Jones v. Dir. of Rev., 981 S.W.2d 571, 574 (Mo. 1988) (en banc). Words in a statute "should be given their plain and ordinary meaning whenever possible." Spradlin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. 1988) (en banc). Courts will look elsewhere for interpretation only when the meaning is ambiguous or the plain meaning would lead to an illogical result defeating the purpose of the General Assembly. Id.

To interpret the meaning of MO. REV. STAT. § 443.130, one need not look any further than the plain language of the statute itself. A reading of the statute demonstrates there is no ambiguity in the statute. Respondents' obligation is clear and precise. The

phrase, "deliver to the person making satisfaction," should be interpreted as written. The plain and ordinary meaning of "deliver to the person making satisfaction," implies actually giving the deed of release to the borrower who has made full payment to the lender the money owed on the note. As such, the statute specifically states that upon receiving demand in the proper form from Appellants, Respondents' obligation was to "deliver to the person making satisfaction a sufficient deed of release…" within 15 business days. The statute defines clearly Respondents' obligation. The clear and unambiguous nature of the statute bars Respondents from adding "file with the St. Louis County Recorder of Deeds Office a deed of release" as an additional method of satisfying the statute.

B. Merely Filing a Deed of Release With the St. Louis County Recorder of Deeds Office Does Not Meet the Requirements of MO. REV. STAT. § 443.130

No Missouri court has held that filing the deed of release with the county of record is the same as delivering to the person making satisfaction a deed of release and that such filing satisfies the requirements of MO. REV. STAT. § 443.110. Filing and delivering the deed of release are two separate and distinct actions. If the statute were satisfied by simply filing a deed of release with the county of record, then it would imply that the statute contemplated a concept of constructive notice for the borrower. In fact, however, the General Assembly eliminated the concept of constructive notice to the borrower in 1994, when it amended the statute to eliminate the recording on the margin of the record as a method to satisfy MO. REV. STAT. § 443.130. (See L.F. 69, 80).

A mortgagee's right to provide constructive notice of the release of the deed to the borrower, by recording on the margin of the record, existed for more than 100 years before the General Assembly removed such a right from the statute. In Dodson v. Clark, 49 Mo. App. 148; 1892 Mo. App. LEXIS 186, (Mo. Ct. App. 1892) the Missouri Court of Appeals described the law, later codified at MO. REV. STAT. § 443.130, stating:

> The law applicable to cases of this kind is found in sections 7094 and 7095, Revised Statutes, 1889, or sections 3311 and 3312, revision of 1879. It is there provided that, when the mortgagee receives full satisfaction of his debt or mortgage, he shall, at the request and at the cost of the mortgagor, acknowledge satisfaction of the mortgage in two ways, to-wit, either by indorsing said satisfaction on the margin of the mortgage record, or by delivering a sufficient deed of release to the mortgagor. Should the mortgagee, after payment of the debt followed by request and tender of costs, fail, for the period of thirty days, as the case may be to deliver such deed of release, then such mortgagee subjects himself to an action by the mortgagor. Dodson at 150.

The court went on to state,

> When the debt is paid, and the mortgage, therefore, satisfied, the mortgagee undertakes and is bound to satisfy the record—either by going to the recorder's office and indorsing satisfaction on the margin of the record, or at his option make and deliver a deed of release; provided only, that the cost to be paid for entering such marginal record satisfaction or cost of making the deed of release be paid by the mortgagor. The two means for relieving the record of the apparent

> incumbrance are open to the election of the mortgage. If the mortgagee shall reside or shall, at the time of the request and tender by the mortgagor, be at such distance from the records that it would be expensive, or, by reason of loss of time or distance to be traveled, it would be reasonably inconvenient to go and enter the marginal satisfaction, then the mortgagee may adopt the other mode, and may, at the cost of the mortgagor, execute and deliver a deed of release. We must presume that the mortgagee knows the law. Dodson at 150-151.

In 1994, the General Assembly amended MO. REV. STAT. § 443.130 to eliminate the phrase "acknowledge on the margin of the record," thereby eliminating a mortgagee's right to simply provide constructive notice of the release to the borrower. (See L.F. 89). The General Assembly did not replace "acknowledge on the margin of the record" with "file with the St. Louis County Record of Deeds Office a deed of release" as a new mode by which the mortgagee could provide constructive notice to borrowers and satisfy the requirements of MO. REV. STAT. § 443.130 (2000). The sole mode remaining in 1994 after the amendment and as applicable to this case is to "deliver to the person making satisfaction a sufficient deed of release." Filing a deed of release with a recorder of deeds office does not comply with the statute.

The uncontroverted material facts show that on or about September 12, 2002, Appellants executed a promissory note to Franklin in the principal amount of $110,500. (See L.F. 89). The repayment of the promissory note was secured by Franklin with a deed of trust on the Property. (See L.F. 89). In or about October 2002, Wells Fargo purchased the promissory note and deed of trust from Franklin and performed acts in

furtherance of its purchase. (See Assignment of Rights listing Wells Fargo as mortgagee L.F. 70; see also Franklin's Answer to First Interrogatory No. 17 admitting that the loan and servicing rights were "sold" to Wells Fargo, L.F. 73; see also Wells Fargo Payoff Certificate stating that Wells Fargo will process, prepare and forward the deed of release and reserving in Wells Fargo "all rights and remedies under the [original] Note and Security Instrument, L.F. 74; see also Wells Fargo Confirmation of Loan Payoff admitting that Wells Fargo is "committed to release the liens on loans it services," L.F. 75; see also October 23, 2002 letter and attached Notice of Assignment from Wells Fargo to Appellants admitting purchase and transfer of loan from Franklin, L.F. 77; see also Wells Fargo Payment Letter, among other things, directing any questions to Wells Fargo and thanking Appellants for "using Wells Fargo," L.F. 78; see also Wells Fargo Final Escrow Account Disclosure, L.F. 79).

Appellants were informed by Wells Fargo that their mortgage would be serviced by Wells Fargo because of the purchase from Franklin and that all future written inquires should be directed to Wells Fargo. (See L.F. 76-78). On February 6, 2004, Appellants satisfied the promissory note by making payment in full to Wells Fargo. (See L.F. 79, 84). On March 4, 2004, Appellants sent a demand letter to Wells Fargo demanding a deed of release. (See L.F. 81-83). Respondents failed to deliver a deed of release to Appellants within 15 day delivery period required to satisfy MO. REV. STAT. § 443.130 (2000). (See L.F. 91).

Consequently, it was error for the court to conclude as a matter of law that Wells Fargo's actions complied with the statute, and the judgment should be reversed and the case remanded.

II. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTED GENUINE ISSUES OF MATERIAL FACT REQUIRING A JURY TRIAL IN THAT WELLS FARGO WAS THE ASSIGNEE, OWNER AND SERVICER OF THE LOAN, AS WELL AS FRANKLIN'S AGENT, AND THEREFORE WELLS FARGO WAS THE PROPER PARTY TO RECEIVE THE STATUTORY DEMAND.

The standard of review for this issue is the same as for Point I, above.

A. Wells Fargo Was the Proper Party To Receive Appellants' Statutory Demand

The second issue raised by Respondents below is that the demand letter should have been served on Franklin instead of Wells Fargo. Appellants, however, were correct in serving their statutory demand letter upon Wells Fargo, not Franklin. The note and mortgage, although originally executed in favor of Franklin, were subsequently assigned and/or transferred to Wells Fargo on October 2, 2002. Wells Fargo, by its own loan documents, admits that it was the transferee and assignee of all aspects of the loan, and in its own capacity as owner, assignee and transferee accepted payment from Plaintiffs, serviced all aspects of the loan, provided the loan payoff information, and accepted payment of the payoff from Appellants. (See Assignment of Rights listing Wells Fargo as mortgagee L.F. 70; see also Franklin's Answer to First Interrogatory No. 17 admitting that the loan and servicing rights were "sold" to Wells Fargo, L.F. 73; see also Wells Fargo Payoff Certificate stating that Wells Fargo will process, prepare and forward the

deed of release and reserving in Wells Fargo "all rights and remedies under the [original] Note and Security Instrument, L.F. 74; see also Wells Fargo Confirmation of Loan Payoff admitting that Wells Fargo is "committed to release the liens on loans it services," L.F. 75; see also October 23, 2002 letter and attached Notice of Assignment from Wells Fargo to Appellants admitting purchase and transfer of loan from Franklin, L.F. 77; see also Wells Fargo Payment Letter, among other things, directing any questions to Wells Fargo and thanking Appellants for "using Wells Fargo," L.F. 78; see also Wells Fargo Final Escrow Account Disclosure, L.F. 79).

MO. REV. STAT. § 443.130 provides: "[t]o qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee, cestui qui trust, or ***assignee*** by certified mail, return receipt requested." Wells Fargo's own loan documents reflect that it is the assignee of Franklin. (See L.F. 77). As such, Wells Fargo is the assignee of Franklin and the proper recipient of Appellants' demand letter. Appellants complied with every requirement of MO. REV. STAT. § 443.130, and Respondents failed to deliver a deed of release to Appellants within the statutory 15 day period. Accordingly, this Court should reverse the trial court in all respects.

B. The Agency Relationship Between Wells Fargo and Franklin Is an Issue of Material Fact To Be Determined By the Jury

Even if this Court finds that Wells Fargo was somehow not an assignee of Franklin, Appellants' First Amended Petition before the trial court alleged that Wells Fargo was an agent of Franklin for all purposes, including the agent for service of the demand letter. (See L.F. 12-13). "Generally, the relationship of principal-agent or

employer-employee is a question of fact to be determined by the jury when, from the evidence adduced, there may be a fair difference of opinion as to the existence of the relationship." Bargfrede v. Am. Income Life Ins. Co., 21 S.W.3d 157, 161 (Mo. Ct. App. 2000). This material fact was not controverted by Wells Fargo or Franklin below.

The trial court here, however, committed reversible error in finding summary judgment for Respondents. The existence of an agency relationship between Franklin and Wells Fargo is an issue of material fact that should be resolved by a jury. This Court, therefore, should reverse the trial court ruling and remand this issue for determination by a jury.

III. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXISTED GENUINE ISSUES OF MATERIAL FACT REQUIRING A JURY TRIAL IN THAT MO. REV. STAT. § 443.130 APPLIES TO THIS TRANSACTION REGARDLESS OF WHEN RESPONDENTS MAY HAVE FILED A DEED OF RELEASE WITH THE ST. LOUIS COUNTY RECORDER OF DEEDS OFFICE.

The standard of review for this claim is the same as for Point I, above.

In Wells Fargo's Reply in Support of Motion for Summary Judgment, Respondents argued that MO. REV. STAT. § 443.130 (2000) is only applicable if the property is unencumbered. (See L.F. 106). The plain language of MO. REV. STAT. § 443.130, however, does not require that a mortgagor can only make a statutory demand upon a mortgagor if the property is currently encumbered. Respondents' argued that "[t]he purpose of section 443.130 is to enforce the duty of the mortgagee to clear the mortgagor's title, so that the record is no longer encumbered." (See L.F. 112; citing Garr, 137 S.W.3d at 460).

The complete Garr opinion, however, also states that "[t]his statute [§ 443.130] is an enforcement mechanism for section 443.060.01, RSMo 2000, which requires a mortgagee to deliver a sufficient deed of release of the security instrument upon satisfaction of the instrument." Id. (internal quotations omitted). MO. REV. STAT. § 443.060.01 (2000) provides: "If any mortgagee, cestui que trust or assignee, or personal representative of the mortgagee, cestui que trust or assignee, receive full satisfaction of

any security instrument, he shall, at the request and cost of the person making the same, deliver to such person a sufficient deed of release of the security instrument…" MO. REV. STAT. § 443.060.01 is concerned only with delivery of a deed of release to a mortgagor by the mortgagee once satisfaction is made on the security instrument. Respondents' suggestion to allow MO. REV. STAT. § 443.130 to be satisfied by merely filing a deed of release with the St. Louis County Recorder of Deeds Office would render MO. REV. STAT. § 443.060.01 meaningless and make MO. REV. STAT. § 443.130 an ineffective "enforcement mechanism" for a statute that requires delivery of a deed of release to the mortgagor. In fact, the Supreme Court in Garr found that recording the deed of release is an action that is not required by MO. REV. STAT. § 443.130. Id.

Although Respondents filed a deed of release with the St. Louis County Recorder of Deeds Office on February 13, 2004, this was meaningless for purposes of this appeal because filing a deed of release is not an action required by the statute. The statute only requires that the deed of release be mailed to Appellants within 15 days of an appropriate demand, which Respondents failed to do. Further, Respondents directed Appellants to "allow a minimum of 90 days prior to contacting the county for a copy of [their] release." (See L.F. 74). Per Respondents' own instructions, therefore, Appellants' sole method of obtaining a copy of their release, without having to wait 90 days, was to send a statutory demand letter to Respondents requesting delivery of the deed of release to them, as provided for by MO. REV. STAT. § 443.130.

Respondents also argued that the requirements of MO. REV. STAT. § 443.130 (2000) do not apply to unencumbered property because it would create an absurd result in

allowing a statutory demand be made fifty years after a property became unencumbered. This argument attempts to redirect the focus of this case from the actual facts. Here, Appellants made a statutory demand upon Respondents less than one month after satisfaction was made. (See L.F. 81). Appellants were advised by Respondents not to contact the St. Louis County Recorder of Deeds Office to determine if a deed of release had been filed on their property. As such, from Respondents' advice, Appellants only could have obtained a copy of their deed of release, within 90 days after satisfaction, from Respondents. It is precisely in these situations that the statute is applicable because it ensures physical delivery of a deed of release in a timely manner. "Section 443.130 is penal in nature, so it must be strictly construed." Garr, 137 S.W.3d at 460. Respondents failed to deliver a deed of release to Appellants within 15 days after a statutory demand was made upon them and Respondents are subject to the penalty provisions of the statute.

This Court, therefore, should reverse the trial court and remand this case for determination by a jury.

CONCLUSION

For the reasons discussed herein, the Judgment and Amended Judgment of the trial court in favor of Respondents should be reversed.

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 84.06(c), that this brief complies with Rule 84.06(c) and Eastern District Rule 360, in that it consists of 5,222 words (not including the cover, the Table of Contents, the Table of Authorities, the Certificate of Service, this certificate, and the signature block).

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was mailed on the 23rd day of August, 2006 by first-class mail, postage prepaid, to:

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