

IN THE SUPREME COURT OF MISSOURI

MARY ETHRIDGE,

Respondent / Plaintiff,

vs.

TIERONE BANK, N.A.,

Appellant / Defendant.

Supreme Court No. SC87734

Southern District No. SD27016

SUBSTITUTE RESPONSE BRIEF OF RESPONDENT MARY ETHRIDGE

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I. STATEMENT OF FACTS

The Respondent finds the statement of facts as presented by the Appellant in its brief on this matter to be argumentative and misleading, and therefore the Respondent states her factual assessment of the case as follows.

The Respondent and her late husband, David Ethridge, acquired the real estate that the Appellant claims to have a valid lien on in this Appeal in Dallas County, Missouri under Warranty Deed dated June 30, 1999. As admitted by the Appellant in its Statement of Facts on page 5 of its substitute brief, the Warranty Deed titled the real estate to the Respondent and her late husband jointly. [See also, Record on Appeal (hereinafter, the “ROA”), pp. 5-6, 22, 70]. On August 6, 2001, Fidelity First Residential Lending, Inc. (“Fidelity First”) extended a loan to David Ethridge individually, and David Ethridge individually and alone executed a promissory note for a principal amount of \$100,000.00. [ROA, pp. 20-21, 29, 94, 159-160, 228]. A Settlement Statement acquired by the Appellant from the U.S. Department of Housing and Urban Development that has no bearing on the liabilities of the parties in this action shows how the loan proceeds were applied. [ROA, pp. 48-49, 161-162].

Also on August 6, 2001, an instrument entitled “Deed of Trust” was made by David Ethridge, “a married man, as his sole and separate property” to Wayne Rieschel Escrow as Trustee for Fidelity First. David Ethridge was a party to the Deed for the purpose of encumbering the real estate held jointly by David and Mary Ethridge. On page one of the Deed of Trust, the “Borrower” is defined as DAVID ETHRIDGE, A MARRIED MAN, AS HIS SOLE AND SEPARATE PROPERTY. [ROA, pp. 10, 163].

Next, the Deed of Trust on page two contains a granting clause in which the “Borrower irrevocably grants, bargains, sells, conveys and confirms” the property to the trustee under the Deed of Trust. [ROA, pp. 11, 164]. Furthermore, the terms of the Deed of Trust as drafted do not make any reference to Mary Ethridge or to any form of “the spouse of the Borrower” in any way. Nonetheless, the Respondent did initial the instrument on its pages and signed her name on page eight of the document in a blank space below the signature of her husband, David Ethridge. [ROA, pp. 10-17, 163-170]. Both David and Mary Ethridge signed below language in the Deed of Trust that limited the acceptance to the terms of the Deed of Trust to that of the person designated as “Borrower.” Specifically, the language says:

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, pp. 17, 170].

Fidelity First subsequently assigned its interest in the Deed of Trust to the Appellant on October 12, 2001. [ROA, p. 18].

Unfortunately, David Ethridge was later killed in an automobile accident on or around December 4, 2002. [ROA, pp. 6, 29, 94, 175, 183]. Thereafter, no payments were made under the Note executed individually by David Ethridge. [ROA, pp. 76, 125, 156]. The circumstances culminated with Mary Ethridge bringing suit against the Appellant on August 5, 2003 in response to the communications she received from the Appellant in which it was represented that she was expected to pay her husband’s unpaid

loan balance. More specifically, Appellant wanted her to re-structure her husband's loan, and the Appellant sent a Notice of Acceleration on the Note executed by David Ethridge. The Respondent claimed that the Appellant did not have a valid lien on the property due to the limitations of the "Borrower" (and thus grantor) in the Deed of Trust as David Ethridge individually and alone. [ROA, pp. 1, 5-8, 156, 185-186].

There has been no dispute during the course of this matter that by signing the Deed of Trust, "David Ethridge purported to convey to Fidelity First Residential Lending, Inc. a first mortgage lien on the above-described real estate." [ROA, p. 6]. 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. [ROA, pp. 71, 74, 77, 82]. Also, in the Respondent's summary judgment pleadings she agrees that the intent of the parties to the loan transaction is "obvious," and that the "obvious intent" referred to was the intent to have a contract between Fidelity First and David Ethridge only. [ROA, pp. 206-207, 230-231]. Finally, the Respondent has made the observation that if she does ultimately prevail in this matter, it will be because the Deed of Trust in question, as drafted by the Appellant's predecessors, is ineffective in making the conveyance it purports to make. [ROA, p. 200].

As already alluded to, both parties in this action filed cross motions for summary judgment. [ROA, pp. 3, 90-93, 171-173]. The Respondent's argument was that the Deed of Trust was ineffective in conveying a lien on the property to the Appellant because the "Borrower" was expressly limited to only David Ethridge, and only the "Borrower"

granted the property, and only the “Borrower” made any warranties or covenants. The Respondent argued that the property held jointly by Tenancy by the Entirety could not be validly conveyed by only one of the joint tenants, thus making the Deed of Trust at issue in this case ineffective. [ROA, pp. 179-213, 229-241].

The Appellant argued that the Respondent’s signature on the last page of the instrument created an ambiguity as to the meaning of the “Borrower” in the Deed of Trust, and that the ambiguity should be resolved in the favor of the Appellant. The Appellant also argued for various other equitable remedies including reformation, estoppel, equitable lien and equitable subrogation. [ROA, pp. 94-170, 214-227].

The trial court ultimately granted summary judgment in favor of the Respondent on April 22, 2005, holding along with *Bradley v. Missouri Pacific Railway Co.*, 4 S.W. 427 (Mo. 1887) 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, pp. 242-243].

II. ARGUMENT

A. The trial court did not err in granting summary judgment in favor of Mary Ethridge and against the Bank because the Deed of Trust is void of ambiguity in that the Deed of Trust is clear as to the definition of “Borrower” (and thus grantor), and there are no inconsistent terms within the Deed of Trust, and as such, the application of Missouri’s canons of construction are not warranted under these circumstances, and the examination of the Deed of Trust should be limited to the four corners of the document.

This point relied upon involves a question of law which is reviewable by this Court *de novo*.

The Southern District has stated that an ambiguity in a contract arises when there is either: (i) duplicity, indistinctness, or uncertainty in the meaning of the words used; or (ii) if the contract promises something at one place and takes it away at another. *Rathbun v. CATO Corp.*, 93 S.W.3d 771, 778 (Mo. App. S.D. 2002). Under the test of these two elements, “a contract is ambiguous only if its terms are susceptible of more than one meaning so that reasonable persons may fairly and honestly differ in their construction of the terms.” *Id.* at 779 (quoting *CIT Group/Sales Fin. Inc. v. Lark*, 906 S.W.2d 865, 868 (Mo. App. E.D. 1995)). In applying the standards of ambiguity, the courts have noted that a mere disagreement as to the meaning of a contract term or definition does not render it ambiguous, and neither strained meanings nor parole evidence will be used to create an ambiguity. *Morgan v. City of Rolla*, 947 S.W.2d 837, 841 (Mo. App. S.D. 1997).

1. The definition of the word “Borrower” in the Deed of Trust executed between David Ethridge and the Bank is not duplicitous, indistinct, or uncertain, and the terms of the Deed are susceptible to only one meaning.

The word at issue as used in the terms of the Deed of Trust executed between David Ethridge and the Bank could not be clearer. On page one of the Deed, in Section B, the term “Borrower” is clearly defined as DAVID ETHRIDGE, A MARRIED MAN, AS HIS SOLE AND SEPARATE PROPERTY. [ROA, pp. 10, 163]. Furthermore, on

page two of the Deed, it is the “Borrower” who grants conveyance to the property in question, and it is the “Borrower” who covenants with the Bank. [ROA, pp. 11, 164]. Nowhere in the eight pages of the document is the definition of “Borrower” changed, altered, or amended. Nowhere do the terms of the document make a reference to anyone other than David as the “Borrower.” There is no reference to Mary Ethridge anywhere in the terms of the document, nor is there any reference in the document to the effect of “Borrower and his spouse.” Even the signature of Mary Ethridge on page eight of the document (which Respondent contends is not a “term” of the document) is not contained on a signature line with her printed name attached. [ROA, 17, 170]. The document, as drafted by Appellant’s predecessor, does not contemplate any other definition of “Borrower” other than that of David Ethridge *individually*.

The Appellant’s contention that the Respondent’s signature on page eight of the document below the language that states, “*By signing below, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument*” creates an ambiguity by changing the definition of “Borrower” is simply and plainly incorrect. Because the definition of “Borrower” is never changed or contradicted by the terms of the instrument, it follows that the “Borrower” on page eight of the Deed of Trust is the same “Borrower” defined in page one of the Deed: David Ethridge *individually*. Only the signature of David Ethridge is on a line with his typed name attached to it, as David Ethridge is the only “Borrower” contemplated by the instrument. [ROA, pp. 17, 170]. The Respondent’s signature, as squeezed into the instrument, does not change the

definition of “Borrower” clearly stated in Section B of page one of the instrument, and there is absolutely no language on Page 8 that changes this conclusion (as correctly concluded both by the trial court and the Southern District of the Court of Appeals).

Both the Southern District and the Missouri Supreme Court have recognized the significance of definitions contained within various contractual documents and legislative rules and statutes, and the Respondent contends that the significance of the internal definition contained within the Deed of Trust at issue in this case should be recognized as well. In fact, the Southern District held that an internal definition of the word “Borrower” within a Deed of Trust is controlling on the question of whether or not subsequent notes will be secured by the collateral when everyone defined in the Deed of Trust as “Borrower” does not execute such subsequent notes. *Maries County Bank v. Williams*, 989 S.W.2d 269 (Mo. App. S.D. 1999); see also, *Shaffner v. Farmers Mut. Fire Ins. Co. of St. Clair County*, 859 S.W.2d 902, 907 (Mo. App. S.D. 1993)(recognizing the importance of definitions contained within insurance policies, and the general rule that such definitions will be controlling); *State ex rel. Missouri Pacific R. Co. v. Koehr*, 853 S.W.2d 925, 926 (Mo. banc 1993)(recognizing that where an internal definition of a word within a Rule is clear and free of ambiguity, it is impermissible to rummage among the statutory canons of construction to devise a different meaning).

Therefore, the Respondent contends that if this Court finds that the internal definition of “Borrower” as used in the Deed is controlling, then it is impossible for Mary Ethridge to be a “Borrower” (and thus a grantor) under the Deed, which would make the

“whole” contract between David Ethridge and the Bank only, regardless of the Respondent’s signature at the end of the document (in a space not even contemplated for a signature no less). The Appellant’s predecessors themselves limited the parties of the Deed to David Ethridge and the Bank by choosing to define “Borrower” as David Ethridge individually. Appellant’s current claim of an ambiguity rings hollow.

The Respondent contends that because the “contract uses clear and unequivocal language, it must be enforced as written,” and that if the Appellant (or its predecessors) wanted to make Mary Ethridge a “Borrower” (and thus a grantor) under the terms of the Deed of Trust, then they should have included such an intention within the terms of the document. *Morgan*, 947 S.W.2d at 841.

2. The Deed of Trust does not contain language that in effect “promises something at one place and takes it away at another.”

The Respondent contends that the Deed of Trust does not contain two inconsistent terms that “promise something at one place and take it away at another.” *Rathbun*, 93 S.W.3d at 778. As Respondent has already stated, the Deed of Trust executed between David Ethridge and the Bank contains a definition of “Borrower” that is clear and unequivocal. There are no other terms in the document that contradict this definition, and the Appellant has not pointed to any such terms. Furthermore, the document’s terms only refer to “Borrower,” and nowhere do they refer to Mary Ethridge or “Borrower’s spouse.” [ROA, pp. 10-17, 163-170]. Even the “*By signing below . . .*” language that the Respondent signed below and that the Appellant so heavily relies on expressly limits itself to be applicable only to the “Borrower.” [ROA, pp. 17, 170]. Therefore, by its

terms, the contract is susceptible to only one meaning: The “Borrower,” David Ethridge, purported to convey property held by himself and Mary Ethridge as tenants by the entirety under the Deed of Trust.

The Respondent respectfully submits that the conveyance did not take effect because property held by tenancy by the entirety cannot be properly conveyed without the consent of *both* spouses, and that the one clear and unequivocal definition of “Borrower” as David *only*, prevented the conveyance from taking effect. The Appellant admits in its Statement of Facts that David and Mary Ethridge held the property in question jointly, and “a husband and wife, to whom an estate is granted as joint grantees, are prima facie tenants by the entireties.” *Nelson v. Hotchkiss*, 601 S.W.2d 14, 19 (Mo. banc 1980). The law is settled in Missouri that a deed by only one of two tenants by the entirety conveys nothing. *Austin & Bass Builders, Inc. v. Lewis*, 359 S.W.2d 711, 714 (Mo. banc 1962). The Respondent respectfully suggests that the fact that a deed cannot be given effect due to a legal impossibility does not automatically create an ambiguity within the instrument, and that certainly there is no ambiguity present in the Deed of Trust at issue in this case.

3. Because there is no ambiguity within the terms of the Deed of Trust, there should be no resort to construction, and parole evidence should not be used to create an ambiguity.

It is an elementary rule of contract law that if a contract is clear and unambiguous, then it will be enforced according to its terms and without construction to determine the

intention of the parties. *J.S. Alberici Const. Co., Inc. v. Emerson Elec. Co.*, 537 S.W.2d 206, 208 (Mo. App. 1976); *Missouri Consol. Health Care Plan v. Blue Cross Blueshield of Missouri*, 985 S.W.2d 903, 909 (Mo. App. W.D. 1999). Furthermore, it has been held in Missouri that a court will not create an ambiguity in order to change the language of an unambiguous contract, or in order to enforce a particular construction that it might feel is applicable. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 594 S.W.2d 950, 954 (Mo. App. E.D. 1980). Finally, it is clear that parole evidence cannot be used to create an ambiguity where there is none. *Frazier v. Yett*, 700 S.W.2d 165, 167 (Mo. banc 1980).

Because the terms of the Deed of Trust executed between David Ethridge and the Bank are devoid of any ambiguity, respondent submits that the Court should disregard the various canons of construction cited and offered by Appellant in its Brief, as they are unnecessary to resolve an ambiguity that is not present in the Deed of Trust, and that the Court should not take into consideration the parole evidence cited and offered by Appellant.

However, if this Court ultimately decides that an ambiguity does indeed exist on these facts, then Respondent asks that the Court consider that the only admissions made by Mary Ethridge as to her intent with regards to the Deed of Trust in question is that she intended to do what her husband told her to do, and that she signed when she was told to sign, and where she was told to sign. [ROA, pp. 71, 74, 77, 82]. Furthermore, when read in context of the entire statement, the Appellant's assertion that Mary agreed that "the

intent of the Deed of Trust is obvious” was in actuality a statement to the effect that the intent was obvious that David Ethridge intended to enter into a Deed of Trust with the Bank, nothing more. [ROA, pp. 206-207, 230-231].

As to its allegations of a mere “scrivener’s error,” the Appellant should be reminded that it was its predecessors that *chose* to define “Borrower” in the Deed of Trust as David Ethridge individually, as the loan closer, Lynn Huff, testified that the Appellant’s predecessors drafted the instrument. [ROA, pp. 54, 143]. The Respondent contends that it was a choice and not a mere drafting error as the Appellant would argue because of the fact that the language defining “Borrower” is obviously typewritten into the document, thus evidencing the intent on the part of the drafter to choose to define “Borrower” as only David Ethridge individually. [ROA, pp. 10, 163]. This was not a mere scrivener’s error; this was a colossal and unilateral mistake of law on the part of Appellant’s predecessor. Furthermore, the Respondent was not incorrect in her statement that if this Court ultimately decides in her favor, then it will be a result of the poor drafting of the Deed of Trust so as to create a legally impossible conveyance. The Respondent does not see how this statement somehow makes the drafting choice of the Appellant’s predecessors the Respondent’s fault, as they want it so desperately to be. The Respondent is merely asserting a viable challenge to the Appellant’s threatened foreclosure on her property, as she has every right to do.

Finally, if this Court ultimately decides that rules of construction are necessary to resolve an ambiguity, the Respondent would ask that this Court carefully consider the

doctrine of *omnia praesumuntur contra proferentem*, which states that the document should be construed to operate most strongly against the party who actually prepared the documents, and in favor of the party who merely signed the documents. See, *Keith v. Tucker*, 483 S.W.2d 430, 434 (Mo. App. 1972). It is clear that the Bank's predecessors had the superior bargaining power in negotiating the note and subsequent Deed of Trust undertaken by David Ethridge, and it is clear that the Bank's predecessors had ultimate power in the drafting of the Deed in question. Through no fault of the Respondent, and with full access to the knowledge of how to properly convey the property, the Appellant's predecessors drafted the Deed so as to create a legally impossible conveyance.

B. The trial court did not err in granting summary judgment in favor of Mary Ethridge and against the Bank because reformation was not appropriate in that there was no preexisting agreement between Mary Ethridge and the Bank's predecessors, and the Bank's predecessors had within their reach the means of ascertaining the nature of David Ethridge's property interest.

While the trial court did not make express findings on the Appellant's defense of reformation, it must be assumed by its judgment that it found the issue consistent with that judgment. However, since the standard of review is *de novo*, the presence or absence of such an assumption would appear to be legally irrelevant.

It has been well established that in order to be granted a reformation of a deed (or any contract in general) based upon mistake, the party seeking reformation must show three elements by the high standard of clear, cogent, and convincing evidence: (i) a

preexisting agreement of the parties that is consistent with the change sought; (ii) a mistake; and (iii) that the mistake was mutual. *Ethridge v. Perryman*, 363 S.W.2d 696, 698 (Mo. 1963). Since the *Ethridge* decision, the Western District has qualified the first element in that “a preexisting agreement between the *parties affected by* the proposed reformation” must be shown (emphasis added). *Morris v. Brown*, 941 S.W.2d 835, 840 (Mo. App. W.D. 1997).

1. The facts do not demonstrate by clear, cogent, and convincing evidence that Mary Ethridge had a preexisting agreement with the Bank or its predecessors.

The Respondent submits that there is no evidence in the record that amounts to clear, cogent, and convincing evidence that Mary Ethridge ever had a preexisting agreement with either the Bank or its predecessors that is consistent with the changes sought by the Appellant in this appeal. In fact, the evidence is that she had no agreement at all. First, it is agreed by both Respondent and Appellant in this case that Mary Ethridge was not, in any way, obligated on the note that was the underlying obligation for which the Deed of Trust in question was drafted. [ROA, 7, 29, 94, 176]. Nor does the underlying note say anything about Mary Ethridge agreeing to join David Ethridge in a Deed of Trust to convey their tenancy by the entirety. [ROA, 20-21, 159-160].

Neither has the Appellant pointed to any prior written or oral agreements between Mary Ethridge and the Bank or its predecessors that indicate that Mary Ethridge ever entered into a preexisting agreement to be included as a party to the Deed of Trust in

question. The Respondent's testimony that she intended to do what her husband told her to do, and that she signed where she was told to sign may constitute an understanding between Respondent and her late husband, but hardly rises to the level of a preexisting agreement between herself and the Appellant's predecessors. All that the Appellant points to as proof of a preexisting agreement is the signature of Mary Ethridge on the Deed of Trust itself, which, as already shown, could not by very definition have obligated Mary Ethridge as either a borrower or grantor. All of the language in the Deed of Trust clearly and unequivocally limits itself to the "Borrower," David Ethridge. [ROA, pp. 10-17, 163-170].

In sum, the Appellant has put forth no facts to establish to the high standard of clear, cogent, and convincing evidence that the Respondent ever had a preexisting agreement with the Appellant or its predecessors that is consistent with the changes it seeks in this Appeal. In relying on *Ethridge v. Perryman*, the Appellant conveniently over-looks the fact that (i) the Respondent had no agreement to borrow money or to grant a mortgage lien on her interest in the real estate with the Appellant's predecessor, and (ii) was not a party to the Deed of Trust, as there are only three such parties – the "Borrower" (David Ethridge), the Trustee (Wayne Rieschel Escrow) and the Appellants predecessor. "Reformation of a written instrument is an extraordinary equitable remedy and should be granted with great caution and only in clear cases of fraud or mistake." *Morris*, 941 S.W.2d at 840. There most certainly was no fraud as the form of the transaction was created by Appellant's predecessor, and there was no mistake between the parties to this

appeal (or Appellants predecessor) because there was no agreement between them that could be mistaken.

2. The Bank's Predecessors, at the time they entered into the Deed of Trust with David Ethridge, had within their reach the means of ascertaining the nature of David Ethridge's property interest.

The Southern District has recently stated that equity will not ordinarily relieve against a mistake of law where the mistake is one of law pure and simple, and neither will equity relieve a mistake when the party who is complaining had within their reach the means of determining the true state of things. *Thompson v. Chase Manhattan Mortg. Corp.*, 90 S.W.3d 194, 205 (Mo. App. S.D. 2002); see also *Cozart v. Mazda Distributors (Gulf), Inc.*, 861 S.W.2d 347, 352-53 (Mo. App. S.D. 1993); *S.G. Payne & Co. v. Nowak*, 465 S.W.2d 17, 20 (Mo. App. 1971). Respondent is aware and concedes that the *Thompson*, *Cozart*, and *Nowak* cases are factually distinguishable from the facts of the instant case. Indeed, Respondent contends that all of the cases cited within both parties' briefs will, for the most part, be factually distinguishable from the instant case, as the facts here are, to Respondent's knowledge, quite unique. However, in applying the established equitable principles stated within these cases to the unique facts of this case, it is clear that these cases can be (and Respondent contends should be) applied to demonstrate the failure of Appellant's claims to the unique facts of this case.

The Respondent first submits that the Appellant's predecessors had at their disposal every means possible to ascertain the nature of David Ethridge's property

interest in the land described within the Deed of Trust that was prepared by Appellant's predecessors, that property interest of course being a tenancy by the entirety with Mary Ethridge. Specifically, the loan closer, Lynn Huff testified that the Appellant's predecessors either had possession of the title work or should have had possession of the title work for the property in question that clearly shows that David and Mary were listed as joint grantees [ROA, pp. 54, 143], and it is common knowledge that "a husband and wife, to whom an estate is granted as joint grantees, are prima facie tenants by the entirety." *Nelson*, 601 S.W.2d at 19 (Mo. banc 1980). Presumably, the Appellant's predecessors had knowledge and experience with executing Deeds of Trust, and presumably they knew that a property held in tenancy by the entirety could not be properly conveyed by only one of the tenants, and they presumably had the legal knowledge to draft a Deed of Trust that would *properly* convey such an interest. Through what can only be described as sheer negligence, Appellant's predecessors applied none of this knowledge. Furthermore, in no way did the Respondent induce the Appellant's predecessors to define "Borrower" in such a manner, and Mary Ethridge never misrepresented the nature of the property interest held by David and herself. The Appellant has argued that the "Borrower" made covenants of title in the Deed of Trust itself, and that Mary Ethridge signed as a "Borrower." In fact, the Respondent made no such representation because only the "Borrower," David Ethridge, made any representations or warranties. Mary Ethridge did not make any covenants or warranties by way of her signature, as the Deed limits such covenants and warranties to "Borrower." [ROA, 11, 164]. The Bank's predecessors, being in the business of loaning money and

taking mortgage liens as security, were in a much better position than Respondent to know that the Deed of Trust in question did not create a valid conveyance; nonetheless, the Appellant's predecessors still managed to draft a Deed of Trust that had no legal effect.

Finally, the fact that the Appellant's predecessors believed that the Deed of Trust would be valid by simply having Mary Ethridge sign the document when she, by definition, could not even be a party to the contract represents a pure unilateral mistake of law, and not a mutual mistake of fact. Therefore, the Respondent contends that the Appellant has not put forth sufficient facts to show by clear, cogent, and convincing evidence that it is entitled to a reformation of the Deed of Trust.

C. The trial court did not err in granting summary judgment in favor of Mary Ethridge and against the Bank because equitable estoppel was not applicable in that the Bank and its predecessors were misled only by their own statements, and the Bank's predecessors had within their reach the means of ascertaining the nature of David Ethridge's property interest.

As with the defense of reformation, it may be assumed that the trial court found this issue against the Appellant and consistent with its judgment for the Respondent, but the standard of review is *de novo*.

Missouri's Appellate Courts have adopted a definition of equitable estoppel that contains three elements, all of which must be proven by the party asserting estoppel by clear and satisfactory evidence: (i) an admission, statement or act inconsistent with a

claim afterwards asserted and sued upon; (ii) action by the other party on the faith of such admission, statement or act; and (iii) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *Thompson*, 90 S.W.3d at 208 (quoting *Van Kampen v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. 1985)). Furthermore, Missouri's Appellate Courts have adopted the view that one party cannot effectively seek relief based upon equitable estoppel unless they were in fact deceived by the conduct of another; nor may they assert estoppel where the party had the same means of knowledge as the other party to the truth of the circumstances. *Id.* Once again, Respondent recognizes that the cases cited can be factually distinguished from the instant case; however, the facts of the instant case as applied to the established equitable principles contained within the cited cases demonstrates the inadequacy of Appellant's claims.

As previously shown, the undisputed facts reveal that Respondent did not make any misrepresentations to the Bank about the nature of her property interest in the property, nor did she agree to or accept the covenants contained within the Deed because she was not the "Borrower." The Deed is unequivocally clear in its limitation of "Borrower" as David Ethridge individually, and it is very clear throughout the Deed in question (even on page eight where the infamous "*By signing below, Borrower . . .*" language resides) that *only* the "Borrower" made any representations or covenants. The Bank's predecessors themselves placed these limitations in the Deed of Trust. Thus, the

record is devoid of any facts that the Respondent made any representations that are inconsistent with the position that she now takes in this action.

Second, the Respondent contends that neither the Bank nor its predecessors took action based upon or relying upon anything that was done by Mary Ethridge. The Respondent contends that the Bank and its predecessors have done nothing more than rely on the erroneous or, dare it be said, incompetent drafting of the Deed of Trust by their own hands. In effect, the Appellant is claiming estoppel because it was deceived by its own statement and the representations of “Borrower” -- David Ethridge individually. Any injuries that the Appellant has received as a result of this transaction have been the direct cause of its reliance on the impossible conveyance created by its own devices.

Finally, the record is clear and the facts are undisputed that the Appellant’s predecessors had title work showing the existence of the tenancy by the entirety. [ROA, pp. 54, 143]. With this knowledge, they nevertheless drafted an instrument that was legally insufficient to convey a mortgage lien, and now come into this Court to assert that the Respondent is subject to equitable estoppel. This position reminds the writer of the prevailing view in Washington, D.C. where every problem is the fault of the speaker’s opponent, whoever that may be at the moment. Appellant’s predecessor created the facts, and yet somehow the Respondent is now responsible for the pickle it created. Equitable estoppel is for those cases where the other party really is responsible for a legal wrong. It is not for those cases where the party bearing the loss created the conditions that gave rise to a loss. Respondent respectfully suggests that the application of equitable estoppel

under these facts would be contrary to the long understood principals of the doctrine, and is plainly unwarranted.

D. The trial court did not err in granting summary judgment in favor of Mary Ethridge and against the Bank because an equitable lien is not justified in that Mary Ethridge is not indebted or otherwise obligated to Appellant and because the doctrine of equitable subrogation is not justified in that there was no fraud on the part of Mary Ethridge, and the legally impossible conveyance created by the Deed of Trust was the result of the Appellant's predecessor's own negligence.

Again, it may be assumed that the trial court found this issue consistent with its judgment, but as with points B and C, this issue is subject to *de novo* review.

1. Mary Ethridge was never personally indebted or obligated to the Bank or its predecessors, thus negating a crucial element in the application of an equitable lien.

Missouri's Appellate Courts have established the elements for the successful application of an equitable lien. The party asserting the lien must show: (i) a duty or obligation owed by one person to another; (ii) a *res* to which that obligation fastens and which can be identified; and (iii) an intent, express or implied, that the property serve as security for the payment of the debt or obligation. *Thompson*, 90 S.W.3d at 209 (quoting *First American Title Ins. Co. v. Birdsong*, 31 S.W.3d 531, 535 (Mo. App. 2000)). Furthermore, the "duty or obligation" required in element number one is not merely any duty owed from any person to another. The Southern District has refused to apply the

doctrine of equitable lien where the Plaintiff herself was not personally indebted or obligated to the Defendants. *Id.*

There is no dispute that Mary Ethridge was not obligated under the note that was executed between David Ethridge and the Bank's predecessors. [ROA, pp. 7, 20-21, 29, 94, 159-160, 176]. *Only* David Ethridge was indebted to the Appellant in this case. Neither do the facts point to any other indebtedness or obligation on the part of Mary Ethridge toward the Appellant in this case. Quite simply, there is no debt due by the Respondent to the Appellant. Thus the crucial element of duty or obligation is nonexistent. Nor has the Appellant pointed to any law to the effect that if one owns property on which the preceding owner was supposed to give a lien on the property to secure his debt only, but failed to do so, the property is subject to an equitable lien in the hands of the subsequent owner. Accordingly, the law is clear that under these circumstances the doctrine of equitable lien is inapplicable (as correctly concluded by the trial court and the Southern District Court of Appeals).

2. The circumstances surrounding the Deed of Trust do not suggest fraud or anything close thereto, and the legally impossible conveyance that resulted from the application of the Deed of Trust was created by the Appellant's predecessor's own negligence, thus negating the application of equitable subrogation on these facts.

The Southern District has adopted the viewpoint that subrogation of one party to the rights of another is a drastic remedy, and that it will be allowed only in extreme cases

that rise to the level of fraud or something bordering on fraud. *Thompson*, 90 S.W.3d at 206. The Southern District has also adopted the view that “against the consequences of that negligence, for which he has no one to blame but himself, a court of equity *cannot* relieve him by interfering with the legal rights of others who are without fault.” *Id.* (quoting *Bunn v. Lindsay*, 7 S.W. 473, 476 (Mo. 1888) (emphasis added)).

The undisputed facts of this case do not show any proof of fraud on the part of Mary Ethridge, or anything approaching fraud. What the facts do show is that David Ethridge *alone* applied to the Bank for a money loan. The lender, with full knowledge that David was married, subsequently approved the loan. Furthermore, the Bank’s predecessors were aware (or had every reason to be aware) that the title to the property in question was vested in David and Mary as joint grantees. [ROA, pp. 54, 143]. In the face of all of these facts, the Bank’s predecessors nonetheless drafted the Deed of Trust so as to create a conveyance that was legally impossible by choosing to define “Borrower” as David individually, thus omitting Mary Ethridge as a party to the Deed, and they did so without the existence of any facts in the Record on Appeal that show fraudulent conduct, or other conduct even bordering on fraud, on the part of Respondent.

Finally, the Respondent contends that: (1) in light of the fact that the Bank’s predecessors were equipped with the knowledge of the true nature of David Ethridge’s property interest in the property in issue (or had the means to easily ascertain such information); (2) and in light of the fact that the Bank’s predecessors presumably had the legal knowledge necessary to effect a conveyance of such an interest; (3) and in light of

the fact that the Bank's predecessors nonetheless drafted a Deed of Trust so as to be ineffectual in conveying such an interest, the Appellant's predecessors acted negligently in the preparation of the Deed, through no fault of Mary Ethridge, and the Appellant and its predecessors have no one to blame for the defective Deed but themselves. See *Thompson*, 90 S.W.3d 194; *Bunn*, 7 S.W. 473; *Landmark Bank v. Ciaravino*, 752 S.W.2d 923 (Mo. App. 1988) (all cases in which negligence on the part of financial institutions relating to property liens precluded the application of the doctrine of equitable subrogation). For these reasons, the valid equitable principles as expressed in Missouri's equitable case law compels a decision that equitable subrogation is inapplicable under these facts.

The Court of Appeals ruled against Respondent on the issue of equitable subrogation, and the above arguments formed the basis for Respondent's arguments to this Court in seeking application to transfer. In an effort to correspond with the structure of Appellant's Substitute Brief, a more detailed analysis of equitable subrogation as applied to the unique facts of this case follows in Subsection F, *infra*.

E. The trial court did not err in granting summary judgment in favor of Mary Ethridge and against the Bank on the basis of the *Bradley* decision because *Bradley* ultimately controls in that none of the legal theories advanced by the Appellant in this case are applicable based upon the facts present in the record and thus, Mary Ethridge was entitled to summary judgment as a matter of law based upon the *Bradley* decision.

The Missouri Supreme Court, in *Bradley v. Missouri Pacific Railway Co.*, 4 S.W. 427, 428 (Mo. 1887), clearly held that a party in whom the title is vested must use appropriate words to convey an estate, and that signing, sealing and acknowledging a deed by a wife, in which her husband was the only grantor, did not convey her estate. That was good law in 1887, and its good law 119 years later. Contrary to Appellant's argument, the Respondent does not contend that the *Bradley* decision is absolute and therefore "trumps" all equitable maxims. She does, contend, however, that none of the equitable defenses raised by the Appellant are legally cognizable and, therefore, *Bradley* controls the outcome in the absence of such defenses.

The absence of such defenses can be summarized as follows: (1) The theory of ambiguity is not applicable because the terms of the Deed in question (specifically, the definition of "Borrower") are clearly defined and susceptible to only one meaning, and are not in conflict with one another; (2) the theory of reformation is not applicable because there was no preexisting agreement and the Appellant had the means to discover its own negligence; (3) the theory of equitable estoppel is not applicable because the Appellant (or its predecessor) merely relied upon its own statements and negligence and because once again it had the means to discover its own negligence; (4) the theory of equitable lien is not applicable because Mary Ethridge is not indebted or obligated to the Appellant in any way; and (5) the theory of equitable subrogation is not applicable because Mary Ethridge did not make any misrepresentations and because the Appellant's

negligence in drafting a deed for a legally impossible conveyance was in no way the fault of the Respondent.

Therefore, because none of the Appellant's theories are applicable, and because David and Mary Ethridge owned the property in question as tenants by the entirety, and because under the clear terms of the Deed of Trust in question the Respondent could not have been a "Borrower" (and thus could not have been a grantor), and because by the clear terms of the Deed of Trust only the "Borrower" made any conveyance or covenants, it follows that Mary Ethridge did not use appropriate words to convey her interest in the tenancy by entirety. Thus, under the precedent set forth in *Bradley*, the Deed of Trust at issue in this case was ineffective in that a tenancy by the entirety cannot be conveyed without the conveyance of *both* tenants in the entirety.

F. The Court of Appeals for the Southern District erred in reversing the trial court's grant of summary judgment in favor of Respondent on grounds that the possible application of equitable subrogation could not be ruled out as a matter of law because the Court of Appeals effectively overruled existing equitable principles in that the Court of Appeals did not conclude or make any findings that there are undisputed facts that meet the condition of circumstances bordering on fraud (i.e. circumstances rising to the level of "injustice" absent the application of subrogation), and in that the Court of Appeals failed to apply the longstanding equitable maxim that a Court cannot, through equity, relieve a party of his own negligence by interfering with the legal rights of others who are without fault.

Again, it may be assumed that the trial court found this issue consistent with its judgment, but as with points B, C, and D this issue is subject to *de novo* review.

1. The history of equitable subrogation in Missouri’s courts shows that there has, in the past, been an implied condition precedent to the application of equitable subrogation of circumstances that would create an “injustice” absent the application of the doctrine, and such condition precedent has been expressly stated by contemporary Missouri Courts as circumstances of fraud, or circumstances “bordering on fraud.”

Missouri Courts have correctly adopted the viewpoint that subrogation of one party to the rights of another is a drastic remedy, and that it will be allowed only in extreme cases that rise to the level of fraud or something bordering on fraud. *Thompson*, 90 S.W.3d at 206; see also *Ciaravino*, 752 S.W.2d at 927-28. The Court in *Thompson* noted that this viewpoint has developed over time as Missouri courts have developed and applied the doctrine of equitable subrogation. *Id.* Therefore, Respondent respectfully submits that this viewpoint is a contemporary codification of an equitable subrogation standard that has been around in Missouri courts for a long time, usually stated as circumstances that would create an “injustice” absent the application of the doctrine. A quick review of the factual circumstances in the cases cited by Appellant to defeat the clearly expressed viewpoint in *Thompson* and *Ciaravino* reveals the existence of either actual fraud, or something akin thereto, in cases where Missouri courts have affirmatively

granted equitable subrogation in favor of a party, even though such viewpoint may not be expressly stated:

a. *Anison v. Rice*, 282 S.W.2d 497 (Mo. 1955).

This was the case primarily relied upon by the Court of Appeals and is the case primarily relied upon by the Appellant as being the most analogous to the facts in the instant case. Therefore, the facts of this case will be given due attention in this brief, *infra*. However, for purposes of furthering her point in this section of the brief, Respondent respectfully notes that the *Thompson* Court expressly states in its opinion that, although the *Anison* Court does not expressly make the finding, the actions of the debtors in *Anison* could justifiably be classified as “bordering” on fraud. *Thompson*, 90 S.W.3d at 206.

b. *State Sav. Trust Co. v. Spencer*, 201 S.W. 967 (Mo. App. S.D. 1918).

In this early subrogation case, the doctrine was applied in favor of a Bank who paid off a first deed of trust of the debtor. The facts clearly show that the Bank lent the money to the debtor based upon the debtor’s false representations that the second and third lien holders had agreed to subordinate their interests to the Bank. *Id.* at 968. Because of the fraudulent circumstances, and because the second and third lien holders were not prejudiced, the Court applied the doctrine of equitable subrogation to the Bank. *Id.* at 971.

c. *Williams v. Vaughan*, 253 S.W.2d 111 (Mo. banc 1952).

In this equitable subrogation case, the “injustice,” or circumstances bordering on fraud, comes into play on the facts of the case in that the lenders simply were not at fault; they did nothing wrong. The lenders in good faith relied upon the representation of a legal guardian that he had the legal authority from the probate court to procure loans on behalf of his ward under the circumstances. *Id.* at 113-114. If the lenders had gone to review the statutes to make sure the authority of the guardian was valid under the circumstances, they would not have found any law that prohibited the guardian from procuring the loans on behalf of the ward. *Id.* The outcome would have been borderline fraud if equitable subrogation had not been applied under these circumstances where the lenders relied in good faith on the guardian’s representations, and where the law did not expressly prohibit the guardian from procuring the loans.

d. *Boatmen’s Bank of Cape Girardeau v. Evans*, 715 F.Supp. 942 (E.D. Mo. 1988).

This is a federal case that is persuasive authority only. Nonetheless, in this case, the facts show that the lender in question already had a valid security interest in the collateral in question. Under the circumstances of this case, there was another lien holder that had priority to the same collateral. When the debtor became financially unstable, the lender made a second loan to the debtor and made sure to pay off the creditor that had priority interest in the same collateral. *Id.* at 943-944. In the case, the lender already had a *properly* executed security interest in the collateral, and the lender made the second loan, although under no legal right to do so, for the sole purpose of paying off superior liens to move up on the creditor priority list in an effort to protect its own interests in the

collateral it *already* had a proper security interest in, and it did so correctly while properly observing the formalities required to obtain its interest. *Id.* Furthermore, the federal court, in applying equitable subrogation, noted, “the factual situation is somewhat different than the usual subrogation case which generally involves construction securities.” *Id.* at 944.

e. *Title Insurance Corporation of St. Louis v. United States*, 432 S.W.2d 787 (Mo. App. E..D. 1968).

Respondent is unsure why Appellant has chosen to rely on this particular case, as the doctrine of equitable subrogation is not even discussed by the Court except for the limited purpose of announcing that the parties to the case agreed that the Title Insurance Corporation was equitably subrogated to the rights of the holder of an original note. *Id.* at 791. However, to demonstrate Respondent’s point, the facts of the case are that a lender loaned money to a debtor in exchange for a note, and thereafter the **same lender** allowed the debtor to re-finance the mortgage with a second promissory note. Subsequently, the lender assigned its interest in the second note to the Title Insurance Corporation. The United States had tax liens against the debtor that were subsequent to the first note, but prior to the second note. The parties agreed that the Title Company was subrogated to the rights of lender in the first note as to the \$14,938.17 of equity that had already been paid off in the first note at the time the second note was executed. *Id.* at 788-789. Although the Court did not decide whether or not equitable subrogation was appropriate under these facts, if it had done so, it could most likely be said that it would

be something akin to fraud to not allow the same lender (or his assign) to be subrogated to its own rights in the first note when it loaned the money to re-finance its own note.

f. *Martin v. Nixon*, 4 S.W. 503 (Mo. 1886).

Respondent is uncertain why Appellant has chosen to rely on this case for its argument to defeat Respondent's assertion that fraudulent circumstances, or circumstances bordering on fraud, must be shown in order to apply the doctrine of equitable subrogation. Respondent respectfully contends that Martin does not involve any discussion on the doctrine of equitable subrogation; it involves the principles of equitable lien and reformation. This case explains how defective deeds may be made effective in equity, and not how one party is subrogated to the rights of another party through equity. As already argued in Subsections B and D, *supra*, and as will be argued further, *infra*, the doctrines of reformation, equitable lien, and equity in general, cannot be applied to aid the Appellant under the unique facts of this case.

In all of the equitable subrogation cases cited above, there is generally something in the facts that strikes a "chord" of injustice absent a finding of the affirmative application of equitable subrogation in favor of a party. In the instant case, however, that element simply is not there upon an examination of the facts, as will be shown. Appellant states on page 32 of its Substitute Brief that Respondent's reliance on the equitable principles set forth in *Thompson* and *Ciaravino* that fraud, or circumstances bordering on fraud, need to be established for the application of equitable estoppel, "utterly ignores" the precedent in the cases cited above. After review of the factual

circumstances and holdings in the cases identified by Appellant in support of their argument, it becomes clear that those equitable principles as stated in *Thompson* and *Ciaravino* are in fact quite consistent with the above cited precedent, and that the principles as stated in *Thompson* and *Ciaravino* are valid contemporary codifications of principles that have been developed over time as a part of the “back-bone” of equitable subrogation as it has been applied from at least as early as 1918. Therefore, Respondent submits that the equitable principles clearly expressed in *Thompson* and *Ciaravino* are currently the unquestioned law of this State.

2. The undisputed facts of this case do not reveal any extreme circumstances of “injustice” or extreme circumstances that border on fraud, and the Court of Appeals did not conclude or make any finding of fact that such circumstances existed.

The Appellant takes the position that the facts of the instant case are distinguishable from those found in *Thompson* (which refused to apply equitable subrogation), and that the facts in the instant case are more on point with *Anison v. Rice*, 282 S.W.2d 497 (Mo. 1955) (which applied equitable subrogation). The Southern District agreed with Appellant’s argument. However, while attempting to make that distinction, the Southern District opinion and the Appellant appear to have ignored the “fraud or conduct bordering on fraud” principal as a condition precedent to the application of the doctrine of equitable subordination. After the Southern District’s opinion in the instant case, it appears that it may be sufficient to apply the doctrine of

equitable subrogation if a loss is incurred, even if the loss was not caused by the party sought to be charged, and **even if** the loss was caused **solely** by the party seeking relief. This is a major and substantial change in the law of equitable subrogation as expressly stated in *Thompson* and *Ciaravino* that, while not expressly stated, is contrary to the well established law dating back to at least 1918, and is contrary to previous opinions of other Districts of the Court of Appeals, and represents an effective change in the law applicable to the Courts in the Southern District that should be approved by this Court if the change is to stand.

To demonstrate the effect of the Southern District's opinion, in *Anison*, which the Southern District opinion finds to be closer in facts than those in the *Thompson* case, the loan in question was procured by the Defendant borrower because a pre-existing loan on his property held in joint tenancy with the co-Defendant was in default and he was seeking an emergency loan from an individual acquaintance in order to avoid foreclosure. *Anison*, 282 S.W.2d at 499. The Plaintiff lent the money on the promise by the Defendant borrower that he and the joint owner co-Defendant would execute proper security for the loan. It was never proven that the joint owner co-Defendant ever agreed to the emergency loan or to the subsequent promise to provide proper security, and the Defendants thereafter unilaterally refused to cooperate in order to give proper security or to otherwise satisfy the conditions of the loan. *Id.* at 499-500. From the factual recital in *Anison*, it is clear that the circumstances of that case bordered on fraud in that the borrowers refused to do that which was promised would be done as an inducement to make the loan. In addition, the lender was an individual not as well-equipped as a

Banking institution to make sure that loans are legally secured. Furthermore, as already noted, the *Thompson* Court also correctly stated that the factual circumstances of *Anison* could justifiably be classified as bordering on fraud. *Thompson*, 90 S.W.3d at 206.

A review of the facts in the instant case reveals that they are not analogous to *Anison* for the following reasons. In the instant case, there is no evidence that Respondent and David Ethridge were in danger of default on their pre-existing loan. Respondent's husband, with the concurrence of the Appellant's predecessor, made the decision to use the proceeds of the loan, in part, to pay off the pre-existing loan. Furthermore, David Ethridge and his spouse (the Respondent) cooperated with the Bank and did everything that they were asked or told to do (unlike the facts in *Anison*), and the lender here was a Bank (whose instrument was defective) that was in the business of loaning money and securing those loans with properly executed deeds of trust or mortgages. The Bank was in complete control in setting the conditions for making and securing the loan and throughout the process the Respondent and her husband complied with every condition that the Bank placed on them. Yet, through no fault of the Respondent, the Appellant's unilateral negligence caused the Deed of Trust to be ineffectual to convey a valid mortgage lien (for the reasons previously stated). [ROA, pp. 54, 143]. Thus, the Appellant's predecessor is the direct and proximate cause of the Appellant's loss in this case. This was not the case in *Anison*.

For equitable subrogation to apply in the instant case, Respondent submits that the Respondent must have done something fraudulent or committed acts bordering on fraud that created the condition or conditions that caused the lender a loss. Although

Respondent concedes that the *Thompson* and *Ciaravino* cases are factually distinguishable from the instant facts, that does not change the validity of the generally applicable equitable principles stated in those equitable subrogation cases, and when the established equitable principles are applied to the instant facts, Respondent submits that grounds for the application of equitable subrogation simply cannot be established by Appellant here either.

Because it is clear that each case must be examined on its own facts, and because there are no facts, much less disputed facts, that give rise to fraud, conduct bordering on fraud, or extreme circumstances creating an overall sense of “injustice” on the part of the Respondent, it can only be concluded that the Southern District’s opinion effectively overrules the principals of equitable subrogation that have long been established, and that have been stated as recently as 2002. To apply equitable subrogation on these facts would be to change the very tenants and principal of equitable subrogation, and render it a doctrine to be used by the careless, the negligent and, dare we say, even the stupid (with no disrespect intended to the Appellant who acquired note and deed of trust by assignment or to Appellants present counsel who had nothing to do with this transaction except to try and defend it *post facto*) to correct their own carelessness, negligence or stupidity, regardless of the lack of bad or even careless conduct on the part of the other party.

Finally, the Respondent is aware that she benefited from the discharge of the pre-existing loan against her property held in tenancy by the entirety with her husband under these circumstances. However, the *Thompson* decision makes it very clear that the mere

fact that a windfall may occur does not *per se* require a finding that equitable relief in favor of the party who will be injured as a result of that windfall is appropriate. *Thompson*, 90 S.W.3d at 204-05. Here, the facts of the case once again illustrate that any losses sustained by the Appellant will be the proximate result of its own negligence, with no fault, based upon the undisputed facts, attributable to the Respondent.

3. Equitable subrogation cannot not be applied to the instant case, and should not have been applied to the instant case by the Southern District, because the longstanding equitable maxim that a Court cannot, through equity, relieve a party of his own negligence by interfering with the legal rights of others who are without fault, when applied to the undisputed facts of this case, precludes the application of equitable subrogation, and all other equitable relief prayed for by Appellant.

In addition to the fact that equitable subrogation should not be applicable because of the absence of fraud or conduct bordering on fraud, Respondent respectfully submits that, under the unique circumstances of this case, equitable subrogation cannot be applied to aid the Appellant pursuant to the longstanding equitable maxim that: “against the consequences of that negligence, for which [a party] has no one to blame but himself, a court of equity *cannot* relieve him by interfering with the legal rights of others who are without fault.” *Bunn v. Lindsay*, 7 S.W. 473, 476 (Mo. 1888) (emphasis added). This equitable maxim has been recently affirmed and restated in *Thompson*, 90 S.W.3d at 206, and in *Ciaravino*, 752 S.W.2d at 929.

The Southern District, in failing to apply the equitable principle that equity cannot relieve one from the consequences of his own negligence by interfering with the legal rights of others, decided the issue contrary to the existing law applicable to the case. The facts of each case in which equity is invoked are unique, and Respondent concedes that the facts of *Thompson*, *Ciaravino*, and *Bunn*, can be distinguished from the instant case. However, any case in Missouri's legal canon can be distinguished from the instant case, because these facts are unique. With a proper framing of the issues involved, it becomes clear that the equitable principles stated within *Thompson*, *Ciaravino*, and *Bunn*, can and should be applied to the instant case. The above-cited cases are all examples of equitable subrogation cases in Missouri, just as the instant case involves issues of equitable subrogation. The above cases all stand for the proposition that equity will not grant the relief of equitable subrogation when the unique facts of the case demonstrate that the party seeking subrogation is seeking to have the Court relieve it from its own negligence. The above cases all present facts in which lenders were denied equitable relief because their losses were squarely attributable to their own negligence, and not attributable to the party against whom the lenders sought equitable relief. Respondent fails to see why the recognized equitable doctrine that equity will not aid in relieving one from its own negligence should not be applied to the present claim of equitable subrogation, when Missouri Courts have freely applied the doctrine to to deny claims for equitable subrogation dating back as far as 1888.

For the following reasons, Respondent respectfully suggests that the Southern District overlooked the fact that the circumstances of the instant case negate the

application of the doctrine of equitable subrogation as a matter of law, or if this principal was not overlooked, then the Southern District has effectively, if not expressly, overruled established precedent that may properly be overruled only by this Court after a finding that prior precedent is in error. Respondent respectfully suggests that a precedent based on the principal that equity cannot grant relief to one whose loss is caused by his own carelessness is surely not in error.

Thus, Respondent respectfully submits to this Court that notwithstanding the fact that the instant case does not present the same facts as do the *Thompson*, *Ciaravino*, and *Bunn* decisions, there is still no question that in the instant case: (a) the failure of the Deed of Trust was a direct consequence of the Bank's predecessor's own negligence, for which it has no one to blame but itself, as the Bank's predecessors *alone* drafted the defective Deed when they had all of the means necessary to draft it correctly, but negligently failed to do so [ROA, pp. 54, 143]; (b) because the Respondent is in no way *legally* obligated to the Bank for any reason, the Respondent's legal rights will be interfered with if equitable subrogation is allowed to "revive" the pre-existing loan against her and in favor of the Bank, as David Ethridge *alone* executed the underlying promissory note [ROA, pp. 20-21, 29, 94, 159-160, 228]; and (c) the Respondent is without fault in the failure of the Deed of Trust, as she took no part in the drafting of the Deed, and she did everything that she was told to do by the Bank and her husband, without making any representations, much less any that were relied upon by the Bank. [ROA, pp. 54, 143].

Therefore, the equitable principle as cited in *Thompson* that equity *cannot* (a) relieve a party of his own negligence; (b) by interfering with the legal rights of others; (c) who are without fault, is inexplicably ignored by the Southern District in the present case, which therefore effectively overrules that long and well established precedent. Respondent further submits that, in addition to the opinion being in conflict with *Thompson*, the Court's decision that the doctrine of equitable subrogation may apply in the instant case is directly in conflict with other equitable decisions, specifically *Ciaravino*, 752 S.W.2d at 929 (Mo. App. 1988); and *Bunn*, 7 S.W. at 476 (Mo. 1888) (in which the equitable principle was applied to defeat equitable claims because of negligence on the part of lending institutions). As stated by the Court in *Ciaravino*, "It was Landmark's burden to establish that it was entitled to equitable subrogation. Part of that proof was its freedom from negligence." *Id.* at 929. Much like in *Ciaravino*, Appellant in this case simply cannot prove its freedom from negligence, and its claim for relief through equitable subrogation must fail.

G. The Court of Appeals should not be directed to consider the Bank's remaining defenses that were not ruled upon in its opinion in this case because this Court is certainly capable, if it so wishes, of deciding all issues raised in Appellant's Points Relied On in that review of summary judgment proceedings are reviewable *de novo*, and in that an application of the equitable principle that equity cannot relieve a party of its own negligence by interfering with the legal rights of others who are without fault effectively precludes Appellant from successfully arguing *any* of its equitable defenses.

Appellant is correct when it states that the Southern District, in its opinion, did not decide on all of the Points Relied On by the Appellant. However, Respondent respectfully disagrees with the Appellant's assumption (and with "footnote 7" of the Southern District's opinion (p. 20)) that because the trial court only relied on the *Bradley* case in deciding the case on summary judgment, that neither the Court of Appeals nor this Court is capable of deciding the issues presented in reviewing the trial court's decision of summary judgment. The Respondent disagrees with this argument for the following reasons.

First, the review by this Court of a case submitted on summary judgment is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). In addition, there is an established doctrine of appellate review to the effect that, as to all issues to which the trial court did not make specific findings of fact or law, "the trial court is assumed to have made findings consistent with the judgment issued. *Engelage v. Director of Revenue*, 197 S.W.3d 197, 202 (Mo. App. W.D. 2006). Thus, the criteria upon appeal as to the propriety of a grant of summary judgment are no different than that initially employed by the trial court. In addition, "[a]s the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id.* Stated otherwise, this Court (and the Court of Appeals) does not necessarily have to concern itself on a *de novo* review as to what the trial court relied upon to grant summary judgment. As long as the record submitted and the law of the jurisdiction as a whole (not necessarily the law relied upon by the trial court) demonstrate that a party is entitled to

summary judgment, it is not necessarily important how the trial court came to its decision, and the appellate court does not have to defer to the trial court's order or reasoning in granting summary judgment. Respondent submits that its foregoing arguments, along with the facts contained within the Record on Appeal, demonstrate that Respondent is entitled to summary judgment on all of Appellant's Points Relied On notwithstanding the single case relied upon by the trial court in reaching its decision. Because this Court has the power of a *de novo* review of this case, it simply is not necessary, if this Court does not so wish, to send any issues back to the Southern District Court of Appeals.

Second, an application of the equitable doctrine that equity *cannot*, through equity, relieve a party of his own negligence by interfering with the legal rights of others who are without fault, to the facts of this case would in effect preclude any equitable relief in favor of the Appellant as stated within any of its "Points Relied On," as the facts of this case clearly show that the Appellant is seeking all of its equitable relief in an effort to have this Court relieve it of its predecessor's negligence in drafting an ineffectual Deed of Trust when the means to properly draft such Deed were readily available. In addition, the facts show that if the Court were to grant the Appellant relief of its predecessor's negligence, it would be doing so by interfering with the ownership rights in the property of the Respondent, and without the Respondent having any fault in the matter. Therefore, even the equitable defenses that were undecided by the Court of Appeals would be precluded upon application of established equitable doctrines. For all of the foregoing reasons, Respondent respectfully submits that this Court is not under any obligation to

send any of Appellant's "Points Relied On" back to the Southern District if it does not so wish to do so, as all issues may be properly resolved by this Court.

III. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

It is true that Mary Ethridge signed the Deed of Trust in question below the signature of her husband, David Ethridge. She signed her name where she was told to sign it by the closing officer, which was in a blank space underneath her husband's name with no identifying marks; not even so much as a pre-printed signature line with her name on it. [ROA, pp. 17, 170]. The effect of Mary Ethridge's signature on the Deed of Trust is simple; the effect was that it changed nothing. The Deed of Trust was ineffective to convey the property in question before she signed it and the document was ineffective to convey the property in question after she signed it.

The reasoning for this result is also simple. A conveyance by only one tenant in a tenancy by the entirety renders the conveyance invalid. *Austin & Bass Builders*, 359 S.W.2d at 714. By the clear terms of the Deed of Trust, the "Borrower" (and thus the grantor) is clearly defined as David Ethridge *individually*. [ROA, pp. 10, 163]. There is nothing contained within the terms of the Deed of Trust that alters or changes this definition, and the terms of the document are in no way contradictory. Even by signing the final page of the instrument, it is clear that Mary Ethridge never agreed to or accepted anything under the Deed because the "By signing below . . ." language that Appellant relies so heavily upon is expressly limited to the "Borrower." [ROA, pp. 17, 170].

Thus, because Mary Ethridge was not the “Borrower” under the Deed of Trust, she did not properly convey her interest in the estate, notwithstanding the fact that she signed the Deed of Trust at the end thereof. The Appellant seems to be shocked by the idea that a Deed worded to create a legally impossible conveyance can be held to be ineffective, even in the face of *Bradley* and *Austin & Bass Builders*, two examples which show that it can and does happen.

Further, the Respondent respectfully suggests that the definition of “Borrower” as David Ethridge individually in the Deed of Trust was more than just a “clerical error” as the Appellant argues. First, the definition is typewritten onto the document evidencing an intended choice that “Borrower” be so defined. [ROA, pp. 10, 163]. Second, the Bank’s predecessors knew (or were at least in a position to know) that the property in question was titled in the names of David and Mary as husband and wife. [ROA, pp. 54, 143]. Third, the Bank’s predecessors presumably had the legal knowledge to set up an effective conveyance of the type of interest that they should have known David and Mary possessed. Finally, notwithstanding all of the knowledge it had (or was in a clear position to know), the Bank’s predecessors undertook the responsibility of drafting the Deed of Trust and *still* came up with a document that succeeded only in producing a conveyance that was legally impossible. All of this was done through no fault whatsoever on the part of Mary Ethridge. The drafting of the Deed of Trust in the light of all of these facts leads only to the conclusion that the Bank’s predecessors did not merely make a “clerical error;” the Bank’s predecessors negligently drafted a legally

invalid document. The Appellant and its predecessors have no one to blame but themselves. It is for these reasons and the others already stated in this response brief that the Respondent contends that the Appellant is not entitled to equitable relief under these circumstances.

Accordingly, the Respondent respectfully requests that:

1. This Court reverse the opinion of the Court of Appeals for the Southern District of Missouri in this case dated May 11, 2006, insofar as it concluded that equitable subrogation may be applicable.
2. This Court determine that the Deed of Trust at issue in this case is free from ambiguity, that the Deed be interpreted only according to its clear and unequivocal terms, and that as drawn and executed, it is ineffective to convey a valid lien in the property;
3. This Court determine that there was no preexisting agreement between the Respondent and the Appellant (or its predecessors) that the Appellant and its predecessors knew or had the means to know of the property interest held by David Ethridge at the time the Deed of Trust was drafted; and that as a result of these determinations the doctrine of reformation is not applicable on these facts;
4. This Court determine that the Respondent did not make any statements regarding the Deed of Trust at issue in this case, and that even if statements were made the Appellant did not rely in any way on such statements, and

that in fact the Appellant has done nothing more than rely on its own negligently drafted Deed of Trust in the face of facts that they knew or should have known that established the nature of David Ethridge's tenancy by the entirety interest in the property in question, and that as a result of these determinations the doctrine of equitable estoppel is not applicable on these facts;

5. This Court determine that the Respondent is in no way indebted or obligated to the Appellant, and that as a result of this determination the doctrine of equitable lien is not applicable on these facts;
6. This Court determine that nothing in this case either resembles or is in fact fraudulent in nature, and that the Appellant's predecessors negligently drafted a Deed that created a conveyance that was legally impossible notwithstanding the fact that they had information (and thus knowledge) of David Ethridge's tenancy by the entirety property interest, and that such negligent drafting was in no way the fault of the Respondent, and that as a result of these determinations the doctrine of equitable subrogation is not applicable on these facts; and
7. That this Court affirm in full the Judgment of the Honorable John W. Sims, Circuit Judge for the 30th Judicial Circuit, and reverse that part of the Opinion of the Southern District Court of Appeals which holds that

equitable subrogation may be applicable in favor of the Appellant and which remands the case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATION UNDER SUPREME COURT RULES 84.06(c) AND 84.06(g)

I, Kerry D. Douglas, hereby certify that this brief contains all information required by Rule 55.03, and that this brief complies with the limitations contained in Missouri Rule of Civil Procedure 84.06(b), that this brief contains 14,707 words according to the word processing system used to prepare it, and that this brief contains 1,176 lines of monospaced type according to the word processing system used to prepare it.

I, Kerry Douglas, further certify that the disk enclosed herewith pursuant to Rule 84.06(g) has been scanned for viruses and that it is virus-free.

CERTIFICATE OF SERVICE PURSUANT TO SUPREME COURT RULE 84.05(a)

I, Kerry Douglas, hereby certify that under Missouri Rule of Civil Procedure 84.05(a), two copies of this response brief were sent to each opposing counsel for the Appellant by enclosing such copies in envelopes addressed to the individuals listed below and by sending said envelopes via first class mail, postage fully prepaid, on September 28, 2006.

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