

Appeal No. ED 84118

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MISSOURI COURT OF APPEALS

EASTERN DISTRICT

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RODNEY GLASS and DIANE GLASS,

Plaintiffs/Respondents,

vs.

FIRST NATIONAL BANK of ST. LOUIS, N.A.,

Defendant/Appellant.

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APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

DIVISION SEVENTEEN

Cause No.: 02CC-1704

Honorable Larry L. Kendrick

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APPELLANT'S BRIEF

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## **JURISDICTIONAL STATEMENT**

First National Bank of St. Louis, N.A. appeals from a decision of the St. Louis County Circuit Court granting summary judgment on December 31, 2003, in favor of Rodney and Diane Glass. The Glasses were awarded \$52,500.00 on Count I of their First Amended Petition, said figure representing forfeiture of ten percent of the face amount of the deed of trust between First National Bank of St. Louis, N.A., and the Glasses, which was in the amount of \$525,000.00. Summary judgment was granted in favor of First National Bank of St. Louis, N.A. on the remaining counts of the Glasses' First Amended Petition. First National Bank of St. Louis, N.A. timely filed its Notice of Appeal on February 2, 2004.

First National Bank of St. Louis, N.A.'s first through fourth points on appeal do not challenge the validity of any treaty or statute of the United States or of any statute or constitutional provision of the State of Missouri. First National Bank of St. Louis, N.A. does not seek in these points, the construction of a revenue statute, and neither the title to state office nor the imposition of the death sentence is involved. The subject matter of the first through fourth points, therefore, do not involve any subject matter over which the Supreme Court of Missouri has exclusive appellate jurisdiction under Article V, section 3 of the Missouri Constitution. Accordingly, this appeal falls within the appellate and territorial jurisdiction of the Missouri Court of Appeals - Eastern District.

If this Court affirms the grant of summary judgment in the first through fourth points, then First National Bank of St. Louis, N.A., alternatively, contends that this case should be transferred to the Supreme Court of Missouri for consideration of its fifth point on appeal.



First National Bank of St. Louis, N.A. argues in its fifth point that sections 443.060 and 443.130 RSMo. 2000 are unconstitutional in that they violate the due process, equal protection, unlawful takings, and excessive fines clauses of the United States Constitution and the Missouri Constitution. Pursuant to Article V, section 3 of the Missouri Constitution, this point falls within the exclusive appellate jurisdiction of the Supreme Court of Missouri as it challenges the validity of a state statute.

## STATEMENT OF FACTS

On or about December 21, 1999, Rodney and Diane Glass (collectively, the “Glasses”) executed a deed of trust in favor of First National Bank of St. Louis, N.A. (“First National Bank”) in the amount of \$525,000.00 for the purchase of their home located at 12706 Wynfield Pines Court in Des Peres, Missouri. (L.F. Vol. I, p. 10).<sup>1</sup> After a mortgage loan is originated by First National Bank, servicing of the loan, including issuing bills and accepting payments, is subsequently handled by Jefferson Bank through its Loan Servicing Center (“Loan Servicing Center”) in Jefferson City, Missouri. (L.F. Vol. I, pp. 157-160, 162-163, 194-196). The Loan Servicing Center was responsible for servicing the Glasses’ mortgage loan as well as preparing and recording an appropriate deed of release following satisfaction. (L.F. Vol. I, pp. 157-160, 162-163, 194-196).

In 2001, the Glasses began refinancing their home loan in hopes of obtaining a more favorable interest rate. (L.F. Vol. I, pp. 169, 176). The Glasses utilized a mortgage broker, Fidelity Mortgage, to procure a new mortgage loan. (L.F. Vol. I, p. 168). After obtaining a mortgage loan from First National Bank, the Glasses successfully refinanced on three subsequent separate occasions with National City Mortgage, ABN Amro, and Sun Trust, and received a better interest rate each time. (L.F. Vol. I, pp. 168-169). According to Rodney Glass, there were no problems associated with the refinancing with National City Mortgage

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<sup>1</sup>References to the Legal File will be as follows: L.F. Vol. \_\_\_\_, pp. \_\_\_\_.

other than an unrelated issue involving an easement. (L.F. Vol. I, pp. 170-171). National City Mortgage and/or the title company involved in the transaction, Columbian Title Company, satisfied First National Bank's loan on June 13, 2001. (L.F. Vol. I, pp. 177, 185).

After a mortgage loan is satisfied, the Loan Servicing Center generates a Report 20, also called a weekly pay-off report, which reflects the mortgage loans satisfied the previous week. (L.F. Vol. I, pp. 190-192, 197-199). The weekly pay-off report dated June 15, 2001, shows a listing for Rodney M. Glass. (L.F. Vol. I, pp. 202-206). Before release processors for the Loan Servicing Center prepare a deed of release, they pull the loan files, ensure that the files contain a note and deed of trust, and then write on the weekly pay-off report the initials "FDN," representing file, deed, and note, and signifying that a deed of release should be prepared. (L.F. Vol. I, pp. 191-192).

Everything was in order for purposes of preparing a deed of release for the Glass loan, as represented by the initials "FDN" appearing next to Rodney M. Glass's name on the weekly pay-off report. (L.F. Vol. I, p. 202). The goal of the Loan Servicing Center is to have deeds of release fully prepared and forwarded to the appropriate county for recording within a week. (L.F. Vol. I, p. 199).

The release processor for the Loan Servicing Center, Anna Holt, prepared and forwarded the Glass deed of release for recordation to the St. Louis County Recorder of Deeds' office in either June or July of 2001. (L.F. Vol. I, pp. 185, 188, 208, 214; Vol. IV, p. 775). Although Ms. Holt could not confirm the exact date that the Glass deed of release was forwarded for recordation, she testified in her deposition that it was probably sent the week

of June 19, 2001. (L.F. Vol. IV, p. 775). Regardless, the Glass deed of release was sent no later than July 24, 2001, as it was noted in a facsimile letter sent by Ms. Holt to Rodney Glass on July 24 that the deed of release had been sent to St. Louis County for recordation. (L.F. Vol. I, pp. 185, 188). The Glass deed of release was executed by Ronald R. Klatt and Jennifer L. Poole, both of the Loan Servicing Center, with a notary date of June 19, 2001. (L.F. Vol. I, p. 218). The Glass deed of release was not recorded by the St. Louis County Recorder of Deeds' office until October 9, 2001. (L.F. Vol. I, p. 217).

It was well-known by employees of the Loan Servicing Center that the St. Louis County Recorder of Deeds' office was continually "backlogged" with filings, and it typically took several months to have a document recorded and returned. (L.F. Vol. I, pp. 200-201, 215-216). In addition, First National Bank learned through investigation that the St. Louis County Recorder of Deeds' office was undergoing a reorganization in 2001, and employed a clerk who was charged with embezzling funds from the office. (L.F. Vol. I, p. 166).

Rodney Glass sent an undated, certified letter to First National Bank in July or August of 2001. (L.F. Vol. I, p. 219). This letter purportedly requested a deed of release, included evidence that the deed of trust had been satisfied, and enclosed a check for recording fees. (L.F. Vol. I, p. 219). This letter did not reference any statute, including section 443.130 RSMo. 2000; did not request the issuance of a deed of release within a certain period of time; did not specify to whom the deed of release should be sent; and did not reference any penalties for failure to provide the deed of release within a certain period of time. (L.F. Vol. I, p. 219).

Having not received back the recorded deed of release from the St. Louis County Recorder of Deeds' office, First National Bank provided the Glasses with their original note marked "paid" on August 22, 2001. (L.F. Vol. I, pp. 220-224).

The Glasses have successfully refinanced their home loan on three occasions subsequent to obtaining the loan from First National Bank. (L.F. Vol. I, pp. 169, 178-179). The Glasses have refinanced with National City Mortgage, ABN Amro, and Sun Trust. (L.F. Vol. I, pp. 169, 178-179). After these refinancings, the Glasses have sent demand letters to each financial institution requesting a deed of release and, for the first time, citing section 443.130 RSMo. 2000, which provides for the ten percent forfeiture for failure to supply the deed of release within 15 business days. (L.F. Vol. VI, pp. 1186-1190).

Rodney Glass admitted that he is not aware of any problems or complications, nor have he and his wife suffered any financial loss, relating to First National Bank's alleged failure to provide a deed of release. (L.F. Vol. I, pp. 171, 179). Rodney Glass further admitted that he has no evidence that he and his wife have been harmed in any manner as a result of the alleged actions or inactions of First National Bank. (L.F. Vol. I, p. 182). Finally, Rodney Glass stated that his credit remains impeccable in his estimation. (L.F. Vol. I, p. 184).

The Glasses filed suit against First National Bank alleging causes of action for penalties and attorney's fees under section 443.130 RSMo. 2000, for invasion of privacy/unreasonable publicity of another's private life, for interference with prospective advantage, and for punitive damages. (L.F. Vol. I, pp. 9-16). The Glasses and First National Bank submitted motions for summary judgment. (L.F. Vol. I, pp. 91-238; Vol. II, pp. 239-506). On

December 31, 2003, the St. Louis County Circuit Court granted summary judgment in favor of the Glasses on a portion of Count I of their petition. (L.F. Vol. VI, p. 1207). The Glasses were awarded \$52,500.00, representing forfeiture of ten percent of the amount of the deed of trust. (L.F. Vol. VI, pp. 1208-1209). On the remaining portion of Count I seeking attorney's fees, as well as on the counts for invasion of privacy/unreasonable publicity of another's private life, interference with prospective advantage, and punitive damages, summary judgment was entered in favor of First National Bank. (L.F. Vol. VI, pp. 1208-1209). The Glasses have not appealed the grant of summary judgment in favor of First National Bank on these counts. First National Bank timely filed its Notice of Appeal regarding the award of \$52,500.00 on February 2, 2004. (L.F. Vol. VI, pp. 1203-1209).

## **POINTS RELIED ON**

- I. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because their demand letter failed to follow the requirements of section 443.130 RSMo. 2000 in that it did not reference section 443.130 and did not request that the deed of release be sent within 15 business days.

Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. App. 2002)

Roberts v. Rider, 924 S.W.2d 555 (Mo. App. 1996)

Section 443.060 RSMo. 2000

Section 443.130 RSMo. 2000

- II. **The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because First National Bank of St. Louis, N.A. fulfilled its obligations under section 443.130 RSMo. 2000, in that it executed the Glass deed of release and forwarded it to the St. Louis County Recorder of Deeds' office prior to receiving Rodney Glass' demand letter, but due to circumstances beyond the control of First National Bank, the deed of release was not recorded within 15 business days.**

Section 443.060 RSMo. 2000

Section 443.130 RSMo. 2000

- III. **The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because their predatory use of section 443.130 RSMo. 2000 for personal financial gain is not within the legislative intent of the statute to facilitate**

**the clearing of title through the filing of deeds of release because the Glasses have not suffered any prejudice from the failure to receive the deed of release given that they have been able to successfully refinance their home mortgage on three subsequent occasions, each time attempting to collect the penalty provided within section 443.130.**

Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. App. 2002)

Ong Bldg. Corp. v. GMAC Mortgage Corp., 851 S.W.2d 54 (Mo. App. 1993)

Bartareau v. Executive Bus. Prods., Inc., 846 S.W.2d 248 (Mo. App. 1993)

Section 443.130 RSMo. 2000

**IV. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because they do not have standing to challenge compliance with section 443.130 RSMo. 2000, in that the statute requires the deed of release to be delivered to the person making satisfaction, which in this case is the lending institution subsequent to First National Bank of St. Louis, N.A., and not the Glasses.**

Roberts v. Rider, 924 S.W.2d 555 (Mo. App. 1996)

Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. App. 1996)

Section 443.060 RSMo. 2000

Section 443.130 RSMo. 2000



- V. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because sections 443.060 and 443.130 RSMo. 2000 are unconstitutional in that they violate the due process, equal protection, unlawful takings, and excessive fines clauses of the United States Constitution and the Missouri Constitution.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001)

Washington v. Glucksberg, 521 U.S. 702 (1997)

United States v. Lanier, 520 U.S. 259 (1997)

## **STANDARD OF REVIEW APPLICABLE TO POINTS RELIED ON**

Appellate review of a trial court's grant of summary judgment is essentially de novo. In Re: THF Chesterfield N. Dev., L.L.C. v. City of Chesterfield, 106 S.W.3d 13, 16 (Mo. App. 2003). Because the propriety of summary judgment is purely an issue of law, the appellate court need not grant any deference to the trial court's order because its judgment is founded on the record submitted and the law. Id. The appellate court employs the same criteria used by the trial court in determining the propriety of sustaining the summary judgment motion initially. Stotts v. Progressive Classic Ins. Co., 118 S.W.3d 655, 660 (Mo. App. 2003).

Summary judgment is proper when the movant can establish that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. In Re: THF, 106 S.W.3d at 16. In ruling on a motion for summary judgment, a court tests simply for the existence, not the extent, of genuine disputes. Id. "A genuine dispute exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts." Id.

The appellate court reviews the record in the light most favorable to the party against whom judgment was entered and the non-movant is accorded the benefit of all reasonable inferences from the record. Stotts, 118 S.W.3d at 660.

## ARGUMENT

- I. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because their demand letter failed to follow the requirements of section 443.130 RSMo. 2000 in that it did not reference section 443.130 and did not request that the deed of release be sent within 15 business days.**

The trial court granted summary judgment in favor of the Glasses pursuant to section 443.130 RSMo. 2000.<sup>2</sup> The Glasses were awarded \$52,500.00, representing a penalty of ten percent of the face amount of their \$525,000.00 security interest. The trial court erred as a matter of law in granting summary judgment because the Glasses did not sufficiently invoke the penalty provided in section 443.130.

Section 443.060.1 requires a mortgagee, after receiving full satisfaction of any security instrument, and at the request and cost of person making satisfaction, to deliver to such person a sufficient deed of release of the security instrument. Section 443.130 is the mechanism to enforce the obligation set out in section 443.060.1. Section 443.130 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.

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<sup>2</sup>All future statutory references are to RSMo. 2000 unless otherwise indicated.

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.

Section 443.130 triggers an obligation to pay the ten percent penalty only if a demand is made and all other elements of the statute are met. The purpose of section 443.130 is to enforce the duty of the mortgagee to clear the mortgagor's title, so that it is apparent from an examination of the record that the encumbrance no longer exists. Roberts v. Rider, 924 S.W.2d 555, 558 (Mo. App. 1996); Ong Bldg. Corp. v. GMAC Mortgage Corp., 851 S.W.2d 54, 55 (Mo. App. 1993).

Numerous cases in Missouri have recognized that section 443.130 is highly penal and must be strictly construed. See Murray v. Fleet Mortgage Corp., 936 S.W.2d 212, 215 (Mo. App. 1996); Roberts, 924 S.W.2d at 558; Trovillion v. Chem. Bank, 916 S.W.2d 863, 865 (Mo. App. 1996); Masterson v. Roosevelt Bank, 919 S.W.2d 9, 10 (Mo. App. 1996); Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822, 823 (Mo. App. 1995); Martin v. STM Mortgage Co., 903 S.W.2d 548, 550 (Mo. App. 1995). "When the basis of an action is a statute that is highly penal, the statute must not only be strictly construed, but must be applied

only to such cases as come **clearly within its provisions and manifest intent.**" Roberts, 924 S.W.2d at 559 (emphasis added).

The mortgagor carries the burden of proving that the requirements of section 443.130 have been met. Trovillion, 910 S.W.2d at 824. Given the strict construction of section 443.130, all doubts regarding whether a plaintiff's claim falls within the purview of the statute must be construed in favor of the defendant. The Glasses' claim must fail because their demand letter fails to cite section 443.130 and fails to request the deed of release within the requisite 15 business day period.

This present appeal is governed by the case of Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. App. 2002). In Lines, the plaintiffs were parties to an earlier declaratory judgment action against Mercantile regarding various notes and security interests. Id. at 677. This suit was resolved by a written Settlement and Mutual Release Agreement, which was the means by which the security interests were satisfied. Id. at 677-78. The plaintiffs sent Mercantile a certified letter demanding release of a deed of trust and enclosing a check for costs to record the appropriate deed of release. Id. at 678. The letter further requested that Mercantile "proceed appropriately to effect release of the aforementioned deed of trust." Id.

When the deed of release was not forthcoming, the plaintiffs filed suit claiming Mercantile refused to deliver a sufficient deed of release within 15 business days of their request. Id. at 679. Because the deed of trust secured an indebtedness of \$327,181.00, the plaintiffs sought damages of \$32,718.10 plus interest and attorneys fees. Id. The trial court granted summary judgment in favor of Mercantile. Id.

On appeal, the plaintiffs argued that Mercantile failed to perform its obligation to release the deed of trust after receiving a demand letter that satisfied all elements of a claim for statutory damages as provided in section 443.130. Id. Mercantile responded that the demand letter sent by the plaintiffs was not sufficient to invoke the statutory forfeiture in section 443.130. Id. Specifically, Mercantile pointed out that the letter did not reference section 443.130, thereby putting Mercantile on proper notice that a statutory demand for a deed of release was being made, and the letter did not request a deed of release within 15 business days. Id. Rather, the letter only asked for Mercantile to proceed appropriately to effect release of the deed of trust. Id. The appellate court agreed that the letter sent by the plaintiffs did not invoke the penalty provided by section 443.130.1. Id. at 680.

With striking similarity, the Glass letter is insufficient to invoke the penalty in section 443.130. (L.F. Vol. I, p. 144). The Glass letter does not reference section 443.130 and does not request a deed of release within 15 business days. (L.F. Vol. I, p. 144). The letter only requests that First National Bank deliver the requested deed of release promptly, but does not specify to whom the release should be sent. (L.F. Vol. I, p. 144). Nothing in the text of the Glass letter was sufficient to place First National Bank on proper notice that a statutory demand for the deed of release was being made.

Moreover, there is only a generic reference to a “mortgage/deed of trust,” but given that the Glasses had not only a mortgage loan, but a home equity line of credit, the letter is vague and ambiguous as to what it specifically requests. The deeds of trust relating to the mortgage

loan and the home equity line of credit were both secured by the Glasses' home at 12706 Wynfield Pines Court, Des Peres, Missouri. (L.F. Vol. I, pp. 226-227).

The same deficiencies exist in Glasses' demand letter as in Lines. The letter does not comply with section 443.130, as defined in Lines, in that it does not reference the statute and there is no request for a release to be recorded within 15 business days. The Glasses, therefore, are precluded from collecting the penalties provided under section 443.130.

The rationale from Lines, which requires specific reference to section 443.130 in order to recover the statutory penalty, is in conformity with another similar statute, section 290.140, the service letter statute. This statute provides that requests for service letters must be in writing, sent by certified mail, and make specific reference to the statute. Section 290.140.1. Similar to section 443.130, the service letter statute is penal in nature and requires strict construction. Worth v. Monsanto Co., 680 S.W.2d 379, 381 (Mo. App. 1984). Because of the strict construction of the statute, failure of an employee to request a service letter by certified mail or failure to reference the statute in the letter relieves the employer of its obligation to provide a service letter. Bartareau v. Executive Bus. Prods, Inc., 846 S.W.2d 248, 249-50 (Mo. App. 1993).

Because section 443.130 is also a penal statute, it is reasonable to require a debtor who makes full satisfaction to place a bank on statutory notice of any claims under section 443.130. In fact, it is more rational to require specific statutory reference to place a party on notice under section 443.130 than it does under the service letter statute because an automatic

ten percent penalty is mandated under 443.130, whereas a corporation is only liable for compensatory damages to the extent the plaintiff can prove damages based on the failure to issue a service letter.

The purpose of section 443.130 is the clearing of title through the filing of deeds of release. Requiring debtors to place financial institutions on proper notice that a statutory demand for a deed of release is being made removes any uncertainties between the parties. Allowing debtors, like the Glasses, to hide behind a vague and tersely written demand letter, that simply requests a deed of release be delivered promptly and does nothing to place the financial institution on notice of the brief time period for compliance with the demands in the letter, clearly thwarts the express purpose of the statute, which is the prompt clearing of title.

The Glasses have refinanced their mortgage loan on three subsequent occasions. On each occasion, the Glasses have attempted to “set up” other financial institutions by sending similar purported demand letters for deeds of release. It is interesting to note that the Glasses’ letters of February 14, 2002, September 24, 2002, October 31, 2002, and April 25, 2003, specifically reference section 443.130 and the 15-business day compliance period. (L.F. Vol. VI, pp. 1187-1190). Inclusion of this information is certainly not a coincidence and is an attempt by the Glasses to make their predatory demands comply with the holding in Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. App. 2002).

Section 443.130 is a penal statute and must be strictly construed so that the imposition of the penalty falls clearly within the provisions of the statute and its manifest intent. Roberts,



924 S.W.2d at 559. Using strict construction, this Court should hold that the Glasses' demand letter is insufficient to invoke the penalties provided in section 443.130 because it does not reference the statute or the 15-day period for compliance. Lines, 70 S.W.3d at 79. This Court should, therefore, reverse the grant of summary judgment in favor the Glasses.

**II. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because First National Bank of St. Louis, N.A. fulfilled its obligations under section 443.130 RSMo. 2000, in that it executed the Glass deed of release and forwarded it to the St. Louis County Recorder of Deeds' office prior to receiving Rodney Glass's demand letter, but due to circumstances beyond the control of First National Bank, the deed of release was not recorded within 15 business days.**

Assuming *arguendo* that the Glasses have complied with the requirements of section 443.130, First National Bank, to the fullest extent of its ability, fulfilled its obligations under sections 443.060 and 443.130 given that First National Bank prepared and forwarded for recording the Glass deed of release to the St. Louis County Recorder of Deeds' office. For this reason, the trial court erred in penalizing First National Bank for failing to provide the Glass deed of release in a timely manner.

Prior to any demand for a deed of release by the Glasses, the Loan Servicing Center, which was the entity responsible for preparing the deed of release, generated a weekly pay-off report dated June 15, 2001, for the Rodney M. Glass loan. (L.F. Vol. I, pp. 202-206). Release processors then checked the Glass file to ensure that it contained the appropriate note and deed of trust. (L.F. Vol. I, pp. 191-192). If the particular loan file contains the note and the deed of trust, then a notation of "FDN" is made on the weekly pay-off report representing that a deed of release should be prepared. (L.F. Vol. I, pp. 191-192). These initials appear next to Rodney M. Glass's name on the weekly pay-off report. (L.F. Vol. I, p. 202). It takes the Loan

Servicing Center approximately one week to check the contents of the file, prepare the deed of release, and deliver it to the appropriate county for recordation. (L.F. Vol. I, p. 199).

The Glass deed of release was prepared and forwarded to the St. Louis County Recorder of Deeds' office in either June or July of 2001. (L.F. Vol. I, pp. 185, 188, 208, 214; Vol. IV, p. 775). Although Anna Holt, the release processor for the Loan Servicing Center, could not confirm the exact date that the Glass deed of release was forwarded for recordation, she testified that it was probably sent the week of June 19, 2001. (L.F. Vol. IV, p. 775). Regardless, the Glass deed of release was sent no later than July 24, 2001, as it was noted in a facsimile transmission sent by Ms. Holt to Rodney Glass on July 24 that the deed of release had been sent to St. Louis County. (L.F. Vol. I, pp. 185, 188). This information is consistent with the execution date of the Glass deed of release, which was executed by Ronald R. Klatt and Jennifer L. Poole, both of the Loan Servicing Center, with a notary date of June 19, 2001. (L.F. Vol. I, p. 218).

For reasons unbeknownst to First National Bank, the Glass deed of release was not recorded by the St. Louis County Recorder of Deeds' office until October 9, 2001.

First National Bank nor the Loan Servicing Center has control over when documents are recorded by the St. Louis County Recorder of Deeds' office. St. Louis County is the largest county in the state of Missouri, thus, it was well known to the Loan Servicing Center employees that St. Louis County was often backlogged with regard to filings and that it typically took months to have a document recorded and returned.

(L.F. Vol. I, pp. 200-201, 215-216). Through investigation, First National Bank learned that the St. Louis County Recorder of Deeds' office was undergoing reorganization in 2001 and employed a clerk who was charged with embezzling funds. (L.F. Vol. I, p. 166).

By the time of the Glass demand letter in August, First National Bank had performed the task requested in the letter by preparing the deed of release and forwarding it to the St. Louis County Recorder of Deeds' office for recordation. There is no probative evidence to show that the delay with regard to the filing of the deed of release was in any way caused by the actions or inactions of First National Bank. With no control over the filings at the St. Louis County Recorder of Deeds' office, First National Bank could not provide a deed of release to the Glasses until such time as it was returned from the recorder of deeds' office. First National Bank forwarded the recorded deed of release to the Glasses within a reasonable time after it was received from the St. Louis County Recorder of Deeds' office. (L.F. Vol. II, p. 394). The production of the deed of release was certainly prompt given that the Glasses' own demand letter was not sent until August of 2001 for a loan satisfied in June. (L.F. Vol. I, p. 148). Moreover, the fact that the Glasses did not have a recorded deed of release was certainly a non-issue with the first subsequent refinancing institution, National City Mortgage, as the Glasses were on their second refinancing, with ABN Amro, when the deed of release issue arose. (L.F. Vol. I, p. 174-175).

At the time of the Glass demand letter, First National Bank was in compliance with sections 443.060 and 443.130, as it had sent the Glass deed for recordation to St. Louis County. What happened with the deed once it arrived at the St. Louis County Recorder of Deeds ' office is a matter of pure speculation. The one item of certainty is that First National Bank had no control over the time and manner in which the St. Louis County Recorder of Deeds' office received and recorded the deed of release. To hold First National Bank liable for a substantial penalty when it fulfilled its obligations under the statute to the fullest extent of its ability is incongruous. This Court should reverse the grant of summary judgment in favor of the Glasses.

**III. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because their predatory use of section 443.130 RSMo. 2000 for personal financial gain is not within the legislative intent of the statute to facilitate the clearing of title through the filing of deeds of release because the Glasses have not suffered any prejudice from the failure to receive the deed of release given that they have been able to successfully refinance their home mortgage on three subsequent occasions, each time attempting to collect the penalty provided within section 443.130.**

The purpose of section 443.130 is to “enforce the duty of the mortgagee to clear the title of the mortgagor, so that it [is] apparent upon examination that the incumbrance [sic] of record no longer exists.” Ong Bldg. Corp. v. GMAC Mortgage Corp., 851 S.W.2d 54, 55 (Mo. App. 1993). The safeguards meant to be achieved by section 443.130, related to the clearing of title, are completely non-existent in this case. This case involves an original mortgage loan from First National Bank to the Glasses and three subsequent refinancings of this mortgage loan in hopes of achieving a better interest rate. The Glasses never paid off this loan, they simply substituted one lender for another.

The Glasses were not prejudiced or aggrieved by any alleged failure of First National Bank to provide a deed of release within the time frame of section 443.130. In addition, it is clear from the subsequent actions of the Glasses that their true intent was to use section 443.130 in a predatory fashion for their own financial benefit.

After the mortgage loan with First National Bank, the Glasses refinanced this loan with National City Mortgage, ABN Amro, and Sun Trust. (L.F. Vol. I, pp. 168-169). Each subsequent refinancing brought a better interest rate for the Glasses. (L.F. Vol. I, p.169).

According to Rodney Glass, there were never any problems with refinancing the mortgage loan, except for an unrelated issue regarding an easement. (L.F. Vol. I, p. 170). The fact that the Glasses did not have the First National Bank deed of release never presented an obstacle to their ability to refinance their mortgage loan. Moreover, the Glasses were provided with an original note marked "paid" by a representative of First National Bank on August 22, 2001. (L.F. Vol. I, pp. 220-224). Any delay in the preparation of the deed of release was inconsequential as far as the Glasses' ability to obtain refinancing of their mortgage. Finally, as noted by Rodney Glass, his "credit is impeccable." (L.F. Vol. II, p. 292). Clearly, the Glasses were not prejudiced by the failure to have the deed of release within the time frame of section 443.130.

The Glasses were never interested in receiving a deed of release or, as Rodney Glass suggested in his deposition, to have a "deed of release in hand." Obtaining a deed of release was never the goal of the Glasses. Rather, the driving force in this case was the ten percent penalty provided by section 443.130, as admitted by Rodney Glass in his deposition. (L.F. Vol. II, p. 281).

In the refinancing boom of the late 1990's and early 2000's, the Glasses successfully refinanced their mortgage loan on three separate occasions. Interestingly, on each occasion, the Glasses attempted to “set up” several other financial institutions by sending the same purported demand for a deed of release that was sent to First National Bank. Other financial institutions that received a demand letter from the Glasses include: National City Mortgage Company, ABN Amro Mortgage Group, Inc., and Countrywide Home Loan. (L.F. Vol. VI, pp. 1186-1190).

In 2001 alone, the Glasses refinanced their home loan on two occasions. The Glasses sent their demand letter to First National Bank in August 2001. (L.F. Vol. I, p. 148). They sent a similar letter to National City Mortgage less than two months later. (L.F. Vol. VI, p. 1186). It leads one to believe that the multiple refinancings in such a short time was at least partially motivated by the Glasses' desire to capitalize on the penalties provided in section 443.130.

As noted in point one above, another important aspect of the Glasses' demand letters is the fact that the letters of February 14, 2002, September 24, 2002, October 31, 2002, and April 25, 2003, specifically reference section 443.130 and the 15-business day compliance period. (L.F. Vol. VI, pp. 1187-1190). Inclusion of this information is certainly not a coincidence and is an attempt by the Glasses to make their predatory demands comply with the holding in Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. App. 2002).



It seems abundantly clear from the half-dozen letters sent to various financial institutions that the Glasses have engaged in a patterned practice to misuse section 443.130 in an attempt to better their financial position. Certainly, predatory use of section 443.130 for personal financial gain was not the intent of the Missouri legislature when they drafted this legislation. The Glasses' misuse of this statute is even more egregious given that they have suffered absolutely no prejudice from the failure to have a deed of release. The deeds of release never presented an obstacle to the Glasses with regard to refinancing.

While section 443.130 does not expressly contain a finding that the plaintiff prove prejudice or some form of damage in order to recover under the statute, the Missouri legislature could not have intended this statute to be used in the way that the Glasses have staged it to be used. "In cases where the language is clear, [the court] will look beyond the plain and ordinary meaning of the statute only if the meaning would otherwise lead to an illogical result which would defeat the purpose of the legislation." Bartareau v. Executive Bus. Prods., Inc., 846 S.W.2d 248, 250 (Mo. App. 1993). Requiring some showing of prejudice before recovery of the ten percent penalty would prevent debtors such as the Glasses from using the statute in a predatory fashion.<sup>3</sup>

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<sup>3</sup>States with statutes similar to section 443.130 impose a nominal penalty and require a showing of actual damages in order to recover more than the nominal sum of money. *See* Ariz. Rev. Stat. section 33-712 (2004); Cal. [Obligations] Code section 2941 (Deering 2004); Mich. Comp. Laws section 565.44 (2004); Neb. Rev. Stat. section 76-252 (2004).

It is clear that the Glasses are predatorily using section 443.130 for their own personal financial gain. Presumably, this was not the intent of the Missouri legislature when it drafted section 443.130. Rather, the legislature intended for section 443.130 to aid in the clearing of title by the filing of deeds of release. Given the Glasses' successful multiple refinancings, the deeds of release were unnecessary. This Court should reverse the grant of summary judgment in favor of the Glasses.

**IV. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because they do not have standing to challenge compliance with section 443.130 RSMo. 2000, in that the statute requires the deed of release to be delivered to the person making satisfaction, which in this case is the lending institution subsequent to First National Bank of St. Louis, N.A., and not the Glasses.**

As previously noted, numerous cases in Missouri have recognized the highly penal nature of section 443.130 and have ruled that the statute must be strictly construed. *See Murray v. Fleet Mortgage Corp.*, 936 S.W.2d 212, 215 (Mo. App. 1996); *Roberts v. Rider*, 924 S.W.2d 555, 558 (Mo. App. 1996); *Trovillion v. Chem. Bank*, 916 S.W.2d 863, 865 (Mo. App. 1996); *Masterson v. Roosevelt Bank*, 919 S.W.2d 9, 10 (Mo. App. 1996); *Trovillion v. Countrywide Funding Corp.*, 910 S.W.2d 822, 823 (Mo. App. 1995); *Martin v. STM Mortgage Co.*, 903 S.W.2d 548, 550 (Mo. App. 1995). Not only must the statute be strictly construed, but it must be applied only to such cases that clearly fall within its provisions and manifest intent. *Roberts*, 924 S.W.2d at 559.

Section 443.060 provides, in part, that after receiving full satisfaction of a security interest, a mortgagee shall, at the request and cost of the person making full satisfaction, deliver to that person a deed of release. Section 443.130 requires that the deed of release be delivered to the person making satisfaction of the security interest.

In the instant case, neither Rodney Glass nor Diane Glass made “satisfaction.” Rather, the party making satisfaction of this loan was the Glasses’ subsequent lender, National City Mortgage and/or the title company, Columbian Title Company. (L.F. Vol. I, p. 177). Under

strict construction of these statutes, neither Rodney nor Diane Glass are entitled to any penalties.

The manifest intent of section 443.130 is to “enforce the duty of the mortgagee to clear the title of the mortgagor, so that it [is] apparent upon examination that the incumbrance [sic] of record no longer exists.” Ong Bldg. Corp. v. GMAC Mortgage Corp., 851 S.W.2d 54, 55 (Mo. App. 1993). Even though the Glasses refinanced their home loan, they still owed money to a financial institution, regardless of whether it was First National Bank or National City Mortgage. This was not a case where the Glasses paid off their mortgage free and clear. Rather, this was simply a paper transaction in which one lender was substituted for another lender. Therefore, a deed of release was inconsequential to the Glasses given that a lien remained on the property regardless of the lender.

As delineated in the statute, the party most interested in having a deed of release in hand is “the party making satisfaction.” Section 443.130. The plain and ordinary meaning of the phrase “the party making satisfaction” clearly includes the person whose funds are expended to satisfy a mortgage. Masterson v. Roosevelt Bank, 919 S.W.2d 9, 11 (Mo. App. 1996). In Masterson, the mortgagors sought the penalty under section 443.130 when Roosevelt Bank, their lending institution, failed to deliver a deed of release upon the satisfaction of their mortgage in a refinancing transaction. Id. at 10. Nevertheless, upon satisfaction, Roosevelt Bank provided the deed of release to the title company of the new lender as it was instructed to do. Id. The mortgagors claimed that the deed of release should have been sent to them and not to the new lender’s title company. Id. The appellate court held that section 443.130

plainly provides that the deed of release must be delivered to the party making satisfaction. Id. at 11. In this case, the new lender clearly fell within the definition of that phrase. Id.

In the instant case, National City Mortgage and/or Columbian Title Company was the party making satisfaction pursuant to section 443.130. (L.F. Vol. I, p. 177). In the case of successive refinancings, the issue becomes one of priority. The deed of release would only benefit National City Mortgage because without the deed of release, National City Mortgage would remain subordinate to the rights of First National Bank and would be the secondary lien holder.

The deed of release would not and did not benefit the Glasses. The Glasses' mortgage obligation remained unchanged, the only difference was the name of the lender. This point is clarified by the fact that the Glasses were able to successfully refinance with National City Mortgage without needing or having a deed of release in hand from First National Bank.

Pursuant to a strict construction of sections 443.060 and 443.130, the Glasses were not the party making satisfaction of the security interest, and do not have standing to collect the penalty under section 443.130. Because the subsequent lender, National City Mortgage, never requested that a deed of release be prepared and recorded, First National Bank is not responsible for a penalty under section 443.130. For the foregoing reasons, this Court should reverse the grant of summary judgment in favor of the Glasses.

**V. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because sections 443.060 and 443.130 RSMo. 2000 are unconstitutional in that they violate the due process, equal protection, unlawful takings, and excessive fines clauses of the United States Constitution and the Missouri Constitution.**

If this Court affirms the grant of summary judgment in the first through fourth points above, then First National Bank contends that sections 443.060 and 443.130 RSMo. 2000 are unconstitutional. Sections 443.060 and 443.130 are unconstitutional in that they violate the due process, equal protection, unlawful takings, and excessive fines clauses of the United States Constitution and the Missouri Constitution. First National Bank has properly preserved these constitutional issues by raising them as affirmative defenses in the Second Amended Answer (L.F. Vol. VI, pp. 1141-1148) and in the Supplemental Response in Opposition to Plaintiffs' Motion for Summary Judgment. (L.F. Vol. VI, pp. 1178-1184). Moreover, the trial court has disposed of First National Bank's constitutional arguments by granting summary judgment in favor of the Glasses on Count I of the First Amended Petition relating to the ten percent forfeiture and granting summary judgment in favor of First National Bank on the remaining claims in Count I, as well as Counts II, III, and IV of the First Amended Petition. (L.F. Vol. VI, pp. 1206-1209). Finally, First National Bank's constitutional claims are real and substantial and made in good faith based upon the fact that the constitutionality of sections 443.060 and 443.130 are issues of first impression in Missouri. In re G.P.C. v. Cabral, 28 S.W.3d 357, 362 (Mo. App. 2000). Extensive research has not revealed any Missouri case addressing the constitutionality of sections 443.060 and 443.130.

For the foregoing reasons, First National Bank asserts that jurisdiction over this point rests within the exclusive appellate jurisdiction of the Missouri Supreme Court. Nevertheless, First National Bank will present its arguments regarding the constitutionality of sections 443.060 and 443.130 should this Court choose to retain jurisdiction over this point.

#### A. Due Process

Sections 443.060 and 443.130 are unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under Article I, section 10 of the Missouri Constitution, insofar as the statutes establish a penalty for failure to deliver to the “party aggrieved” or the “person making satisfaction” a “sufficient deed of release” upon the conditions specified, without designating who constitutes the “party aggrieved” and “the person making satisfaction,” or what constitutes a “sufficient deed of release.” The statutes fail to articulate clear and defined standards by providing an adequate description of the conduct required of a particular party so as to avoid the penalties prescribed in section 443.130. The statutes, therefore, are void for vagueness, over-broad, arbitrary, and capricious.

Due process prevents the enforcement of criminal or penal statutes that either forbid or require “the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” United States v. Lanier, 520 U.S. 259, 266 (1997). The test to determine whether a statute is sufficiently definite and certain to sustain constitutional scrutiny is whether the words used in the statute “are of

common usage and are understandable by persons of ordinary intelligence.” Roy v. Mo. Dep’t of Corr., 23 S.W.3d 738 (Mo. App. 2000).

The lack of a clear and defined standard for the terms “party aggrieved” and “the person making satisfaction,” and whether these terms are one in the same, is particularly troublesome considering that section 443.130 does not require the plaintiff to show any actual damages. In the absence of a need to show actual damages, it is difficult to determine what qualifies a party as “aggrieved.” The wording of the statute gives defendants no clear idea of the class of individuals or entities to whom they may be held liable (ie., debtor, subsequent lender, assignee, or any individual or entity sending a demand letter). Moreover, it does not give defendants a reasonably precise definition of what constitutes a deed of release “sufficient” to avoid the penalties imposed by section 443.130.

Sections 443.060 and 443.130 are also unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, section 10 of the Missouri Constitution because they are not rationally related to a legitimate state purpose. Even where fundamental rights and/or suspect classes are not implicated, due process requires that statutes be rationally related to a legitimate state purpose. Washington v. Glucksberg, 521 U.S. 702, 728 (1997); Woodson v. Woodson, 92 S.W.3d 780, 784 (Mo. banc 2003); Cas. Reciprocal Exch. v. Mo. Employer’s Mut. Ins. Co., 956 S.W.2d 249, 257 (Mo. banc 1997).

The purpose of section 443.060 and 443.130 has been defined to be the enforcement of the duty of the mortgagee to clear the title of the mortgagor. See Ong Bldg. Corp. v. GMAC Mortgage Corp., 851 S.W.2d 54, 55 (Mo. App. 1993). This purpose, however, is not



accomplished by the statutes as written. The statutes merely state that the mortgagee must deliver to the person making satisfaction a sufficient deed of release. Nothing in sections 443.060 or 443.130 requires that an individual or entity record the deed of release or provide a sufficient deed of release to the debtor or mortgagor. Compliance with the statute does not require the removal of any encumbrance on a title. The statutes, therefore, bear no rational relationship to the purported purpose for which they were enacted.

Furthermore, section 443.130 is unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, section 10 of the Missouri Constitution, because the statute arbitrarily imposes a penalty of ten percent of the amount of the security instrument, regardless of whether the “party aggrieved” can establish any actual damage from the failure to comply with section 443.130. Due process prohibits the imposition of arbitrary punishments on a tortfeasor. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). “[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” Id.

Because the statute does not contain a requirement that a party show actual damages flowing from an individual’s or entity’s failure to comply with section 443.130, there is no apparent basis for the ten percent penalty. As exemplified in this case, parties such as the Glasses can recover \$52,500.00, without evidence that they were in any way harmed by the failure to have a deed of release from First National Bank. The arbitrariness of the amount of

the penalty in section 443.130 is emphasized by the fact that the penalty does not advance a legitimate state purpose as outlined above.

### **B. Equal Protection**

Sections 443.060 and 443.130 are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, section 2 of the Missouri Constitution, because the statutes subject a class of persons or entities to the ten percent penalty to which other persons similarly situated are not subjected. Legislative classifications that do not impinge upon a fundamental right and are not suspect must still be supported by a rational relationship to a legitimate state purpose. Heller v. Doe, 509 U.S. 312, 319-20 (1993); Goforth v. Mo. Dep't of Corr., 62 S.W.3d 566, 568 (Mo. App. 2001).

Because of the construction of sections 443.060 and 443.130, defendants who comply with the bare terms of the statutes, by providing the deed of release to the party making satisfaction but not recording the deed, are not subject to the ten percent penalty although actual damage may have resulted to the plaintiff. On the other hand, defendants whose noncompliance with the terms of the statutes causes no actual damages are subject to the penalty. There is no rational basis for this disparate treatment of similarly situated parties. The statutes, therefore, violate the Equal Protection clauses of the United States and Missouri constitutions.

### **C. Unlawful Takings**

Section 443.130 is unconstitutional under the Takings Clause of the Fifth Amendment of the United States Constitution as incorporated through the Fourteenth Amendment, and under

Article I, section 28 of the Missouri Constitution because, through the ten percent penalty, the statute operates as a taking of private property without providing just compensation. Takings clauses prohibit the taking of private property for private use with or without just compensation. City of Kansas City v. Kindle, 446 S.W.2d 807, 814 (Mo. 1969). The statute transfers money, which is private property, from an individual or entity and gives it to a “party aggrieved” for private use, without consent of the individual or entity. This clearly constitutes an improper taking of private property for private use without just compensation in violation of the United States and Missouri constitutions.

#### **D. Excessive Fine**

Finally, section 443.130 is unconstitutional under the Eighth Amendment of the United States Constitution, as incorporated through the Fourteenth Amendment, and under Article I, section 21 of the Missouri Constitution, because the ten percent penalty constitutes an excessive fine. Section 443.130 is a penal statute, imposing a penalty upon an individual or entity as punishment for failing to supply a deed of release to a mortgagor. Because the penalty is in no way tied to the amount of damages, if any, a plaintiff sustains, the penalty functions similarly to a punitive damage award - a private fine intended to punish the defendant and to deter future wrongdoing. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

While the states possess broad discretion in the imposition of punitive damages, due process imposes substantive limits on that discretion by prohibiting excessive fines. Id. at 433. “The due process clause of its own force also prohibits the States from imposing ‘grossly

excessive' punishments on tortfeasors." Id. at 434. The United States Supreme Court has enforced these limits in cases involving deprivations of property. Id. (*citing* United States v. Bajakajian, 524 U.S. 321, 324 (1998); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996)).

While the constitutional line between an excessive fine and a reasonable fine is imprecise, there are some general criteria employed in making the determination, including the degree of the defendant's culpability and the relationship between the penalty and the harm to the victim caused by the defendant's actions. Id. at 435-36. In the instant case, as outlined in point two above, First National Bank fulfilled its obligations under sections 443.060 and 443.130 to the fullest extent of its ability by preparing and forwarding the Glass deed of release for recordation. As such, it has little, if any, culpability under the statute. Moreover, as outlined in point three above, the Glasses suffered absolutely no harm from the failure to have the deed of release. Therefore, there is little relationship between the Glasses' non-existent harm and the \$52,500.00 penalty. The ten percent penalty in section 443.130, therefore, constitutes an excessive fine in violation of the United States and Missouri constitutions.

## **CONCLUSION**

For the reasons set forth above, this Court should reverse the grant of summary judgment in favor of the Glasses because the Glasses demand letter failed to follow the requirements of section 443.130 in that it did not reference the statute and did not request that the deed of release be sent within 15 business days. Furthermore, this Court should reverse the grant of summary judgment because First National Bank fulfilled its obligations under section 443.130 because it prepared and forwarded the Glass deed of release to the St. Louis County Recorder of Deeds' office prior to receiving Rodney Glass's demand letter. In addition, this Court should reverse the grant of summary judgment because the Glasses's predatory use of section 443.130 for personal financial gain is not within the legislative intent of the statute, and the Glasses have not suffered any prejudice from the failure to receive the deed of release. Finally, this Court should reverse the grant of summary judgment because the Glasses do not have standing to challenge compliance with section 443.130 in that they were not the party making satisfaction.

Should this Court affirm the grant of summary judgment on points one through four, First National Bank contends that sections 443.060 and 443.130 are unconstitutional in that they violate the due process, equal protection, unlawful takings, and excessive fines clauses of the United States Constitution and the Missouri Constitution. Jurisdiction over this point, therefore, would be within the exclusive appellate jurisdiction of the Missouri Supreme Court, and this cause should be transferred.

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## CERTIFICATE OF SERVICE

The undersigned states that on the 1<sup>st</sup> day of June, 2004, an Original and nine (9) copies of Appellants' Brief were filed with the Missouri Court of Appeals, and two (2) copies of Appellants' Brief were mailed to: **Mr. John W. Rourke, Ms. Jennie Bartlett**, Attorneys for Respondents, 812 N. Collins, Laclede's Landing, St. Louis, Missouri 63102-2174.

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## **CERTIFICATE OF COMPLIANCE**

Appellants' Brief includes the information required by Rule 55.03, complies with the requirements of Rule 84.06(b), and contains 9,289 words. It was prepared using Word Perfect 7.0. The computer disks containing said brief provided to the Court of Appeals and opposing counsel are virus-free.

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