

IN THE MISSOURI SUPREME COURT

**SC No.: SC88470
Appeals No.: ED 88183**

SCOTT HUBER AND STEPHANIE HUBER,

Plaintiffs – Appellants,

v.

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

Defendants – Respondents.

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

**SUBSTITUTE REPLY BRIEF OF APPELLANTS SCOTT HUBER AND
STEPHANIE HUBER TO RESPONDENT WELLS FARGO HOME
MORTGAGE, INC.'S SUBSTITUTE BRIEF**

**Kevin Fritz #41638
Johnny S. Wang #57748
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939
(314) 621-6844/Fax
klfritz@lashlybaer.com
jwang@lashlybaer.com**

**Attorneys for Plaintiffs/Appellants
Scott Huber and Stephanie Huber**

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	3
Jurisdictional Statement.....	4
Argument.....	6
I. Introduction.....	6
II. Requiring Delivery of a Deed of Release is Consistent With This Court’s Opinions in <u>Garr</u> and <u>Glass</u>	6
III. Conclusion.....	10

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Garr v. First Nat. Bank of St. Louis</u>	
137 S.W.3d 457 (Mo. 2004) (en banc).....	6, 7, 8
<u>Glass v. First Nat'l Bank of St. Louis</u>	
191 S.W.3d 662 (Mo 2006) (en banc).....	4, 5, 6, 8, 9, 10
<u>Ong Bldg. Corp. v. GMAC Mortgage Corp. of Pa.</u>	
851 S.W.2d 54, 55 (Mo. Ct. App. 1993).....	6, 8

Jurisdictional Statement

Appellants, being dissatisfied with Respondent's incomplete and argumentative jurisdictional statement, submit the following:

This case involved a request by Appellants for statutory penalties to be levied against Wells Fargo Home Mortgage, Inc. ("Wells Fargo"), pursuant to a prior version of Mo. Rev. Stat. § 443.130, as codified in 1994 (the "Statute"). Appellants' Petition requested damages in the amount of \$11,050.00, along with pre-judgment interest, because Wells Fargo failed to meet the requirements of the Statute. L.F. 14. Cross-motions for summary judgment were filed and the trial court entered summary judgment against Appellants on April 27, 2006. L.F. 129-130. The Missouri Court of Appeals, in a unanimous decision, reversed the trial court's grant of summary judgment in favor of Wells Fargo and held that Appellants were entitled to statutory damages as a matter of law because Wells Fargo failed to physically deliver a copy of the deed of release to Appellants. The Missouri Court of Appeals finding was based upon this Court's opinion in Glass v. First Nat'l. Bank of St. Louis, 191 S.W.3d 662 (Mo. 2006) (en banc). On May 29, 2007, Wells Fargo's Application for Transfer was granted and this appeal was transferred to this Court.

V.A.M.S. Const. Art. 5, § 10 provides "Cases pending in the court of appeals may be transferred to the supreme court...by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule." This Court should not exercise jurisdiction over this appeal because the question

presented is not of general interest, nor of importance, and pertains to a statute that was repealed in 2004. Respondent requests this Court review its prior interpretation of the Statute in Glass, despite the fact that the Statute was superseded by Mo. Rev. Stat. § 443.130 (2004) and does not involve an examination of existing law. The question presented by this case and the Court of Appeal's interpretation of the Statute is irrelevant for any future actions because no further claims for statutory penalties may be brought under the Statute.

Respondent suggests that this case presents a question that is of general interest or importance because the Statute, as amended in 2004, still raises the question of whether a lender is required to deliver a deed of release decades after satisfaction is made. This is a red-herring placed before this Court because a careful examination of Mo. Rev. Stat. § 443.130 (2004) shows that the amended statute now contemplates "recording a sufficient deed of release" as a means of satisfying the Statute. Recording a deed of release as a means of satisfaction was expressly revoked in 1994, thereby remedying Respondent's concerns that it seeks this Court to resolve. In addition, Mo. Rev. Stat. § 443.130 (2004) was never at issue in this action, either before the trial court, or before the Court of Appeals, and therefore the statute's interpretation is not ripe before this Court. Because this case does not involve an existing statute or a constitutional question, nor is of general interest or importance to the public, Appellants request that this Court decline exercising jurisdiction over this matter.

ARGUMENT

I. Introduction

Respondent Wells Fargo's Substitute Brief raises one issue that requires a response: whether this Court's interpretation of the Statute in Glass v. First Nat. Bank of St. Louis, 191 S.W.3d 662 (Mo. 2006) (en banc) and Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457 (Mo. 2004) (en banc) require Wells Fargo to satisfy the Statute only by physically delivering a deed of release to Appellants. Despite Wells Fargo's protest, this Court's interpretation of the Statute only permits actual delivery of a deed of release to Appellants as the sole means of satisfying the Statute.

II. Requiring Delivery of a Deed of Release is Consistent With This Court's Opinions in Garr and Glass.

The language of the Statute provided: "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..." The Statute states that the only means of avoiding the statutory penalty is for the lender to deliver a sufficient deed of release to the borrower, who had made satisfaction.

Wells Fargo's reliance upon Garr is misplaced. In Garr this Court relied upon Ong Bldg. Corp. v. GMAC Mortgage Corp. of Pa., 851 S.W.2d 54, 55 (Mo. Ct. App. 1993) to state that "[t]he purpose of section 443.130 is to enforce the duty of the mortgagee to clear the mortgagor's title, so that the record is no longer encumbered."

Garr, 137 S.W.3d at 460. The Ong opinion was issued in 1993 and only interpreted the pre-1994 version of the Statute. Before 1994, Mo. Rev. Stat. § 443.130 provided:

Forfeiture for failing to satisfy. – If any such person, thus receiving satisfaction, do not, within thirty days after request and tender of costs, **acknowledge satisfaction on the margin of the record**, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten percent upon the amount of the mortgage or deed of trust money, absolutely, and any other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction. (emphasis added).

After 1994, significant amendments were made by the General Assembly and the Statute provided:

Forfeiture for failing to satisfy.

1. If any such person, thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, deliver to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely, and any other damages such person may be able to prove such person has sustained, to be recovered in any court of competent jurisdiction. A business day is any day except Saturday, Sunday and legal holidays.
2. To qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee, cestui qui trust, or assignee by

certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.

3. In any such 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.

After the Ong opinion, the General Assembly amended the Statute to require delivery of a deed of release to the borrower as the only means of satisfying the Statute. Garr correctly extends beyond the Ong opinion to interpret the amendments to the Statute as “an enforcement mechanism for section 443.060.01, RSMo 2000, which requires a mortgagee to deliver a “sufficient deed of release of the security instrument” upon satisfaction of the instrument. Garr, 137 S.W.3d at 460. It is undisputed that Wells Fargo failed to deliver a sufficient deed of release to the Appellants and Garr states that the enforcement mechanism should be applied to Wells Fargo for failing to satisfy the requirements of the Statute. Wells Fargo cannot pick and choose portions of Garr to bolster their defense, while ignoring statements from this Court that would expressly penalize Wells Fargo for their actions. Garr supports Appellants’ assertion that delivery of a deed of release to the borrower is the only means of satisfying the Statute.

In Glass, this Court expressly stated that “[e]ven if [the lender] had recorded the deed of release within the statutory deadline, which it failed to do, that would not have

excused its obligation to provide [the borrowers] with the deed as required by section 443.130.1.” Glass, 191 S.W.3d at 667. Wells Fargo casually dismisses this Court’s opinion as dicta and irrelevant to this appeal. It is error to classify this Court’s binding interpretation of the Statute as “casual statements outside the scope of the real inquiry.” See Resp. Sub. Brief 18. This Court clearly stated that upon receipt of a proper demand letter from a party making satisfaction, the Statute requires “the deed of release to be delivered to the person making satisfaction.” Glass, 191 S.W.3d at 667. Rather than being dicta, this Court’s statement is a further clarification that the Statute’s requirements apply, even if the lender records the deed of release. This Court’s statement in Glass is binding precedent that should be given greater deference and consideration than what Wells Fargo suggests.

Wells Fargo also states that Glass, as “requiring lending institutions to provide a ‘copy’ of a previously filed deed of release to a former borrower...,” would create substantial burdens upon lending institutions because lenders would be required to maintain documents indefinitely after the lender/borrower relationship has concluded.¹ See Resp. Sub. Brief 19. This “burden” does not outweigh the benefits of the Statute for two reasons. First, situations could exist where during due diligence for purchase of a

¹ It is important to note that the “substantial burden” feared by Wells Fargo will never occur because the 2004 revision of the Statute abridged the requirement for delivery of a deed of release to the borrower, thereby barring any future demand letters for delivery of a deed of release.

property, a party must request a deed of release from a lender to ensure that title to a property is clear because the original deed of release is missing. Second, in relationships, such as physician/patient or attorney/client, records must be maintained well after the relationship has terminated to protect the interests of the patient or the client. Recordkeeping is a standard practice in business and this “substantial burden” is handled on a daily basis even by Wells Fargo’s counsel. Wells Fargo’s attempt to contravene the requirement of the Statute by claiming laborious recordkeeping as an excuse is absurd.

This Court’s opinion in Glass dictates that Wells Fargo’s recording of the deed of release with the St. Louis County Recorder of Deeds Office is irrelevant to this appeal and that the only requirement of concern to the Statute is whether Wells Fargo delivered a sufficient deed of release to Appellants. Wells Fargo’s failure to perform this act is fatal to their defense and the Statute demands imposition of the penalty.

III. Conclusion

For the reasons discussed herein, the Judgment and Amended Judgment of the trial court in favor of Respondent should be reversed and Appellants be entitled to statutory damages as a matter of law.

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 84.06(c), that this brief complies with Rule 84.06(c) in that it consists of 1,849 words according to the word count of the word processing system used to prepare this brief (not including the cover, the Certificate of Service, this certificate, and the signature block). Pursuant to Rule 84.06(g), I hereby certify that a 3.5 inch diskette, which was scanned for viruses and is virus free, contains the full text of this Brief in Microsoft Word 2003 and has been submitted for filing with this brief.

Kevin L. Fritz #41638
Johnny S Wang #57748
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939 – Telephone
(314) 621-6844 – Facsimile
klfritz@lashlybaer.com
jwang@lashlybaer.com

**Attorneys for Plaintiffs/
Appellants Scott Huber and
Stephanie Huber**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of July, 2007, two true and accurate copies of the foregoing Appellants' Reply Brief, complying with Rule 84.06(a), and a single floppy disk complying with Rule 84.04(g) were mailed, postage prepaid, to: David T. Hamilton, Hazelwood & Weber, LLC, 200 N. Third Street, St. Charles, MO 63301-2890, Attorney for Respondent Wells Fargo Home Mortgage, Inc.

Kevin L. Fritz #41638
Johnny S Wang #57748
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939 – Telephone
(314) 621-6844 – Facsimile
klfritz@lashlybaer.com
jwang@lashlybaer.com

**Attorneys for Plaintiffs/
Appellants Scott Huber and
Stephanie Huber**