**IN THE SUPREME COURT OF MISSOURI**

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Appeal No. SC85578

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L. JOSEPH GARR, III and MARIANNE C. GARR,

Respondents/Cross-Appellants,

vs.

COUNTRYWIDE HOME LOANS, INC.,

Appellant/Cross-Respondent.

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Appeal from the Associate Circuit Court of the County of St. Louis
State of Missouri

Honorable Mary Bruntrager Schroeder, Presiding

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# SECOND BRIEF OF APPELLANT/CROSS-RESPONDENT

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Countrywide was found liable by the trial court for the penalty under Mo. Rev. Stat. § 443.130 (2000) because it immediately recorded a deed of release on the Garrs' property (as requested by the Garrs in their August 8, 2002 letter) rather than provide the Garrs with the release (as § 443.130 requires). Countrywide appeals that highly penal finding.

### A. The Standard of Review is *De Novo.*

As a threshold matter, the Garrs incorrectly dispute that each appeal point raised by Countrywide is subject to *de novo* review by this Court. See Respondents' Brief ("Resp. Br.") at 15-16. Citing Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976) (en banc), the Garrs argue that the judgment of the trial court should be reversed by this Court only if there is no substantial evidence in the record to support the judgment, if it is against the weight of the evidence, or if it erroneously declares or applies the law. Of course, this is the familiar standard applicable in cases where there is conflicting evidence presented at trial. This is not such a case.

As noted in Countrywide's Opening Brief, there was no live or deposition testimony presented to the trial court. All the evidence submitted was in written form, including an uncontroverted affidavit from Mr. Garr, discovery responses, letters, and other documents. (LF20-63; LF117-123). Consequently, the trial court was not required to resolve any conflicting testimony or determine the credibility

of any witnesses in rendering its Final Judgment. In short, the facts below were not in dispute. Indeed, the Garrs do not identify a single evidentiary conflict in the record of this case. The lack of any such conflict was the practical reason the parties agreed to waive a trial -- there was simply nothing for the trier of fact to determine. (LF131).

"[W]here [as here] the issue on appeal is not the sufficiency of the evidence, the reviewing court is not bound by and need not defer to the trial court's conclusions regarding the legal effect of its findings of fact." Standard Professional Services, Inc. v. Towers, 945 S.W.2d 693, 694 (Mo. Ct. App. 1997). "Furthermore, where the evidence is not controverted, no deference is due the trial court's judgment." Id. Instead, review is *de novo*. Id.[1]

The Garrs' reliance on City of Harrisonville v. Public Water Supply District No. 9 of Cass County, 49 S.W.3d 225 (Mo. Ct. App. 2001) is clearly misplaced. Unlike the instant case, the trial court in City of Harrisonville denied the parties' cross-motions for summary judgment. Id. at 229. Then, with the consent of the parties, the trial entered a judgment on the merits. Id. On appeal, the sole point raised by the City of Harrisonville was whether the trial court correctly interpreted

[1] Additional authority in support of the *de novo* standard of review can be found at pages 21-22 of Countrywide's Opening Brief.

the agreement at issue. Id. at 230. The appellate court accorded no deference to the trial court's interpretation of the agreement, stating "[t]he construction of written contracts is ordinarily a question of law, and therefore the trial court's construction of the contract, being a legal conclusion, is not binding on appeal." Id. With respect to the cross-appeal of the Water District, the appellate court correctly applied the deferential standard of review set forth in Murphy because there were several disputed factual issues. Id. at 235-36. In contrast, there are no disputed factual issues in the case at bar. Accordingly, the Murphy standard is inapplicable here.

In attempting to avoid appropriate *de novo* review by this Court, the Garrs go to the extreme of arguing that this Court must defer to the trial court's ruling on Countrywide's assertion that Mo. Rev. Stat. § 443.130 (2000) is unconstitutionally vague. See Resp. Br. at 30. This is patently incorrect. It is well settled that "[c]onstitutional interpretation is an issue of law that this Court reviews *de novo*." Farmer v. Kinder, 89 S.W.3d 447, 449 (Mo. 2002) (en banc). Thus, contrary to the Garrs' arguments, each appeal point raised by Countrywide should be reviewed *de novo*.

## B. The Garrs Failed to Invoke Section 443.130.

As the Court may recall, Countrywide contends in its first appeal point that Mr. Garr's letter dated August 8, 2002 did not invoke § 443.130 because it (1) did not mention the statute, and (2) demanded several actions by Countrywide not required by the statute. (LF54) (A21). Countrywide asserts that, *taken together*, these two factors establish that Mr. Garr's letter cannot be reasonably construed as a proper request triggering the provisions of § 443.130.

In their Brief, the Garrs do not address these two factors in tandem. Rather, they address each factor in isolation -- as if only one, but not the other, was present in this case. Of course, this mischaracterizes Countrywide's argument as well as Mr. Garr's August 8, 2002 letter. Contrary to the Garrs' suggestion, it is not Countrywide's position that Mr. Garr's letter failed to invoke § 443.130 simply because it did not mention the statute. Rather, it is that failure, *coupled with* the more important factor that Mr. Garr's letter demanded several actions by Countrywide not required by the statute, that leads to the inescapable conclusion the statute was not invoked by the Garrs.

In order for a penalty to be imposed under § 443.130, it is mandatory that the lender/mortgagee receive a proper demand letter from a borrower/mortgagor. Consequently, the content of a letter from a borrower/mortgagor is vitally important because it is the sole manner in which a lender/mortgagee will be

notified that it faces a substantial penalty if it does not timely comply with the requirements of the statute. Where, as here, the borrower/mortgagor's letter does not mention § 443.130 and also demands actions by the lender/mortgagee not required by the statute, it is simply not reasonable to construe the letter as a statutory demand. This is especially true when the lender/mortgagee dutifully complies with the borrower/mortgagor's letter, as Countrywide did in the present case.

In Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. Ct. App. 2002), the court held that not every letter from a borrower/mortgagor qualifies as a statutory demand under § 443.130. The certified letter in that case did not reference § 443.130 and did not request a deed of release within 15 business days, as the statute states. Id. at 679. Instead, the letter only made demand "for Mercantile to proceed appropriately to effect release of the . . . deed of trust." Id. The court affirmed a summary judgment in favor of Mercantile because it appeared that plaintiffs had demanded a release in accordance with a settlement agreement previously entered into by the parties rather than demanding a release pursuant to § 443.130. Id. at 677, 679-80.

The Garrs incorrectly assert that Lines is inapposite based on the following statement by the court:

> This opinion holds only that the letter to Mercantile did not invoke the remedy afforded by § 443.130.1. The letter to Mercantile incorporated the settlement agreement, including its provision for release of the deed of trust, and under these facts did not invoke the provisions of § 443.130.

Resp. Br. at 22 (citing Lines, 70 S.W.3d at 680). While the holding in Lines was limited to the particular facts presented in that case, there is nothing in the opinion which suggests that the *analysis* employed by the court in reaching its holding is in any way limited. Thus, as in Lines, this Court should carefully scrutinize the substance of Mr. Garr's August 8, 2002 letter to determine whether or not it fairly invoked § 443.130. As should now be clear, the letter did not do so.

On its face, Mr. Garr's letter does not reference the statute or even Chapter 443 in general. Nor does the letter state or imply that Countrywide has a legal obligation of any sort to comply with its terms. In addition, the letter does not request a sufficient deed of release within 15 business days, as the statute states.[2] These omissions must be considered in conjunction with the last paragraph of Mr. Garr's letter, which demands that Countrywide take three actions:

[2] To this extent, the facts of the instant case are on all fours with Lines.

(1) "immediate" (2) "recording" of a deed of release, and (3) delivery of evidence of the release "to me." (LF54) (A21). While these actions may be required by the Deed of Trust mentioned in Mr. Garr's letter, none of them are required by § 443.130. Thus, Mr. Garr's letter was not sufficient to invoke the remedy of § 443.130.

The Garrs argue that their August 8, 2002 letter did not demand action by Countrywide beyond that required by § 443.130, and, even if it did, Countrywide "only had to comply with the statute's requirements to avoid the statutory penalty." See Resp. Br. at 22. As discussed below, the first part of this argument is demonstrably false and the second is contrary to the law.

**1. The Statute Does Not Require "Immediate" Action.**

Among other things, Mr. Garr's letter plainly demanded an "immediate release of the Deed of Trust against our Marlann Drive property." (LF54) (A21). Section 443.130, however, does not require "immediate" action by a lender/mortgagee -- let alone the type of actions demanded by Mr. Garr. Rather, a lender/mortgagee is permitted 15 business days to deliver a sufficient deed of release to the person making satisfaction of the mortgage debt. (A11).[3]

[3] Contrary to the Garrs' Statement of Facts, the letter dated August 8, 2002 did *not* request "a sufficient deed of release" See Resp. Br. at 9.

### 2. The Statute Does Not Require Recording.

Next, the Garrs argue that the August 8, 2002 letter "did not request that [Countrywide] record the release."[4] Resp. Br. at 23. Selectively quoting the letter, the Garrs claim that it demanded that Countrywide "immediately 'release' and 'deliver **in hand**' the release to [them]." Id. (original emphasis). In actuality, the letter states:

> We are demanding *immediate* release of the Deed of Trust against our Marlann Drive property. Enclosed is a check payable to your institution in the sum of $30.00 to cover the costs of *filing and recording* the Deed of Release regarding the transaction. Please deliver in hand to me *evidence of the release* of the Deed of Trust.

(LF54) (A21) (emphasis added).

To effectuate an "immediate release" of the Deed of Trust, as demanded by Mr. Garr, Countrywide had to record a deed of release. This is clearly what Mr. Garr wanted -- as reflected by the following sentence of his letter, which stated

[4] The Garrs must make this argument because they concede that § 443.130 no longer requires recording. See Resp. Br. at 24 ("The legislature eliminated recording as a means of statutory compliance in the 1994 amendments.").

that he was enclosing funds "to cover the costs of *filing and recording* the Deed of Release." Id. (emphasis added). Mr. Garr also asked Countrywide to "deliver in hand to me *evidence of the release* of the Deed of Trust." Id. (emphasis added). By asking for "evidence of the release," Mr. Garr was plainly seeking confirmation that Countrywide had actually recorded the release. In selectively quoting from the August 8, 2002 letter, the Garrs conveniently omit the key words "evidence of the release" in describing what they requested from Countrywide. See Resp. Br. at 23. When Mr. Garr's August 8, 2002 letter is read as it was actually written, it can only be construed as a demand for Countrywide to record a deed of release -- an action not required by the statute at issue.[5]

### 3. The Statute Does Not Require Countrywide To Deliver A Release To The Garrs.

Finally, the Garrs contend that their demand of Countrywide to deliver evidence of the release *to them* was not beyond the requirements of § 443.130. According to the Garrs, they should be considered "the person making

[5] Oddly, the Garrs accuse Countrywide of "resorting to semantics to spin plain and ordinary language." See Resp. Br. at 23. As the foregoing discussion demonstrates, it is the Garrs who are attempting to improperly rewrite their own August 8, 2002 letter as they now wish it had been written.

satisfaction" under § 443.130.1, and thus the party to whom the release should have been delivered, even though Matrix Financial undisputedly satisfied the Garrs' debt to Countrywide. This argument is contrary to both the statute and the case law.

This very issue was considered in Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. Ct. App. 1996). In that case, the court squarely held, "if the legislature intended that only the mortgagor receive the deed of release, regardless of who made the satisfaction, it would have simply used the word mortgagor." Id. at 11. This holding is especially compelling in view of the fact that the legislature *did* use the word "mortgagor" in § 443.130.2. Thus, the legislature clearly knew how to specify "mortgagor" when that is what they meant. See Armco Steel v. City of Kansas City, 883 S.W.2d 3, 7 (Mo. 1994) (en banc) ("the legislature's use of different terms in different subsections of the same statute is presumed to be intentional and for a particular purpose"); Justice Committee v. City of Poplar Bluff, 991 S.W.2d 708, 711 (Mo. Ct. App. 1999) (same).

In § 443.130.1, the legislature used the term "the person making satisfaction" in identifying the party to whom a sufficient deed of release must be delivered. While "the person making satisfaction" and the "mortgagor" may sometimes be the same, there are many instances were they are not the same. For example, in the common situation where a refinancing lender pays off the

mortgagor's debt, the refinancing lender (not the mortgagor) is "the person making satisfaction." Like Masterson, the instant case involved a refinancing transaction. As such, § 443.130 required that a sufficient deed of release be delivered to the refinancing lender, not the mortgagor.[6]

The Garrs assert that Masterson is inapposite because it "did not hold that a borrower is not deemed to be [the person making satisfaction]." Resp. Br. at 27. Countrywide submits that, in the context of a refinancing transaction, that is precisely what Masterson held. Indeed, if Masterson did not so hold, the court in that case would not have affirmed the summary judgment *against* plaintiffs. See Masterson, 919 S.W.2d at 11. The Garrs are making the same argument here regarding the meaning of the term "the person making satisfaction" that was rejected by the Masterson court as "absurd." Id.

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[6] The Garrs misconstrue at least one other provision of § 443.130.1. Specifically, they repeatedly state that Countrywide is "'absolutely' liable" for the statutory penalty. See Resp. Br. at 10, 17 and 23. According to the case law, the word "absolutely" in § 443.130.1 relates to the method of calculating the penalty, *i.e.*, ten percent of the original amount of the mortgage "without regard to or reduction by partial payments, or releases of portions of the land." Henry v. Orear, 78 S.W. 283, 284 (Mo. Ct. App. 1904).

The Garrs also urge this Court to interpret "the person making satisfaction" as being synonymous with the "mortgagor" because a contrary interpretation "would create the absurd result that the mortgagor does not have standing to demand and obtain a deed of release." Resp. Br. at 27. The Garrs attempt to bolster this argument by claiming a mortgagor is most directly and adversely affected by a lender's failure to comply with § 443.130. Id. at 25, 26 and 27. The Garrs misread the statute in making this argument.

Under the express terms of § 443.130.2, a mortgagor clearly has standing to demand the delivery of a sufficient deed of release from the lender. The lender must then send the release to the mortgagor, provided the mortgagor is "the person making satisfaction." If not, the deed of release must be delivered to the person who paid the lender (*e.g.*, a refinancing lender). Far from being absurd, this makes practical sense for several reasons. First, a refinancing lender has a substantial interest in removing the prior lender's lien from the property that secures its new loan to the mortgagor. See Murray v. Fleet Mortgage Corp., 936 S.W.2d 212, 216 (Mo. Ct. App. 1996) ("First National was a new lender with its own interest in . . . having the existing deed of trust released."). Second, the refinancing lender is both better equipped and more accustomed to recording real estate deeds than the mortgagor. Third, a refinancing lender would not want to depend on the

mortgagor to promptly and correctly record a release affecting its collateral (nor would the mortgagor want to pay the recording fee).

Yet another, and perhaps more compelling, reason exists for rejecting the Garrs' argument that they qualify as "the person making satisfaction." To embrace such an argument would violate the well settled principle that § 443.130 is "highly penal" and must, therefore, be "strictly construed." Snow v. Bass, 174 Mo. 149, 73 S.W. 630, 637 (Mo. 1903); Murray, 936 S.W.2d at 215; Trovillion v. Chemical Bank, 916 S.W.2d 863, 865 (Mo. Ct. App. 1996); Martin v. STM Mortgage Co., 903 S.W.2d 548, 550 (Mo. Ct. App. 1995); Perrin v. Johnson, 124 S.W.2d 551, 555 (Mo. Ct. App. 1939). Under the undisputed facts, Matrix Financial is "the person making satisfaction," not the Garrs. For this additional reason, the Garrs did not invoke § 443.130 with their August 8, 2002 letter.

**4. The Garrs' Other Arguments Do Not Cure Their Failure To Invoke The Statute.**

The Garrs repeatedly assert that Countrywide should have known that their August 8, 2002 letter was a § 443.130 demand because, in Missouri, "persons are conclusively presumed to know the law." See Resp. Br. at 8, 21 and 25 (citing Missouri Highway & Transportation Commission v. Myers, 785 S.W.2d 70, 75 (Mo. 1990) (en banc)). This assertion is to no avail because Countrywide's knowledge of the law does not excuse the Garrs' failure to properly invoke it in the

first instance. Countrywide is not claiming that it was unaware of § 443.130. Rather, Countrywide contends that § 443.130 must be strictly construed and the penalty is available only if a proper demand is made. Against this backdrop, Countrywide did not construe Mr. Garr's August 8, 2002 letter to invoke the statute because the letter did not mention § 443.130 and demanded several actions not required by the statute. It is completely self-serving for the Garrs to now argue that Countrywide "should have known" that their letter was a statutory demand when that is not what it purports to be. The Garrs, too, are presumed to know the law too and should have known how to fairly/properly invoke it.

The Garrs also posit that Countrywide should have just complied with § 443.130 even though their letter requested very different actions than those mandated by the statute. In other words, the Garrs assert that Countrywide should be penalized for *not ignoring* their letter! Indeed, the Garrs do not dispute that "Countrywide did everything that was requested of it by Mr. Garr in his August 8, 2002 letter . . .." See Countrywide's Opening Brief at 34. Accordingly, it is difficult to discern any legitimate basis for the Garrs' complaints in this case. The law is clear that they had the burden to invoke § 443.130. See Martin, 903 S.W.2d at 550 (the borrower must notify the lender with "reasonable certainty" that a statutory demand is being made). Having failed to do so, there is simply no basis for imposing the statutory penalty in this case.

### C. The Garrs Failed To Prove That Countrywide Did Not Comply With Section 443.130.

Should the Court conclude that the Garrs invoked § 443.130 with their August 8, 2002 letter, the Final Judgment of the trial court should still be reversed because the Garrs admittedly failed to prove that Countrywide did not timely send a copy of the Deed of Release to Matrix Financial. See Martin, 903 S.W.2d at 551 (reversing judgment against lender where "plaintiff failed to plead or prove the date of satisfaction."); see also Wing v. Union Central Life Insurance Company, 137 S.W. 11 (Mo. Ct. App. 1911) ("The statute is highly penal, must be strictly construed and the plaintiff invoking it must plead and prove all of the elemental facts . . . Nothing must be left to inference.").

The Garrs try to avoid this appeal point by arguing that they, not Matrix Financial, should be considered "the person making satisfaction" under § 443.130.1. See Resp. Br. at 26-28. As discussed in section B.3 of this Brief, there is no merit to this argument.

Next, the Garrs contend that this appeal point was somehow "waived" because it was not included as an affirmative defense in Countrywide's Answer. See Resp. Br. at 28. This contention is frivolous. The linchpin of a claim under § 443.130 is a failure by the lender/mortgagee to timely deliver a sufficient deed of release to the person making satisfaction. In order to recover the statutory penalty,

the borrower/mortgagor must plead and prove that such a failure has occurred. See Martin, 903 S.W.2d at 551 (among other things, "the petition should . . . aver distinctly the payment of the debt secured or other full performance of the conditions of the mortgage, and demand for entry of satisfaction and *refusal thereof*") (emphasis added).

Thus, far from being an "affirmative defense," proof of a lender's failure to timely deliver a sufficient deed of release to the person making satisfaction is an essential element of a plaintiff's case.[7] The Garrs' own pleadings in this case confirm as much. Specifically, in paragraph 11 of their Petition, the Garrs alleged, "Defendant failed to timely and lawfully deliver to Plaintiffs a sufficient Deed of Release until September 12, 2002, approximately 27 business days following proper demand." (LF8). By making this allegation, the Garrs acknowledged that they are not entitled to recover the penalty under § 443.130 without first proving that Countrywide failed to timely deliver a sufficient deed of release to the person

[7] "Under Missouri's pleading rules, an affirmative defense is a matter that is asserted to avoid liability, even if the facts pleaded in the petition are proved." Boone National Savings & Loan Association v. Crouch, 47 S.W.3d 371, 375 (Mo. 2001) (en banc) (footnote citing Rule 55.08 omitted).

making satisfaction.[8] Moreover, in their summary judgment motion, the Garrs tried to satisfy this burden by submitting an Affidavit from Mr. Garr verifying the fact alleged in paragraph 11 of the Petition. (LF22 at ¶ 16).

The Garrs' citation to Kloos v. Corcoran, 643 S.W.2d 94 (Mo. Ct. App. 1982) provides no support for their novel waiver argument. The issue presented in that case was whether the defendants waived their claim of improper venue when their counsel first entered an appearance in the case and requested additional time to plead before filing a motion to dismiss for improper venue. Id. at 95. The court examined Rule 55.27 and concluded no waiver had occurred. Id. at 95-96. Obviously, Kloos is not remotely similar to the instant case.

The Garrs also attempt to bolster their waiver argument by claiming they propounded interrogatories to Countywide seeking a list of all facts reflecting that Countrywide was not indebted to the Garrs. See Resp. Br. at 29. The Garrs then state, "[t]here is no mention of this defense" in Countrywide's answers. Id. This is simply not true. For example, in relevant part, Countrywide responded as follows to Interrogatory No. 14 served by the Garrs:

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[8] In their Petition, the Garrs incorrectly implied that they were "the person making satisfaction." (LF8 at ¶¶ 11-14). Accordingly, in its Answer, Countrywide asserted that the Garrs failed to state a claim. (LF10 at ¶ 5).

> Plaintiffs' August 8, 2002 letter demanding release of the loan does not conform to the requirements of § 443.130 RSMo., in that it demands release of the lien and that evidence of the Deed of Release recording *be delivered to plaintiff L. Joseph Garr, III*.

(LF36) (emphasis added).

Lastly, the Garrs argue that "when [they] proved they did not timely receive the release, the burden shifted to [Countrywide] to prove otherwise by showing that it either timely provided the release to [the Garrs] or other 'persons [sic] making satisfaction.'"[9] See Resp. Br. at 29. Countrywide is unaware of any

[9] The Garrs are incorrect in stating that they "proved" they did not timely receive the release. See Resp. Br. at 29. As noted on page 36 of Countrywide's Opening Brief, the Garrs ***never denied*** that they timely received a copy of the recorded Deed of Release from the St. Louis County Recorder of Deeds. As the Court may recall, Countrywide directed the St. Louis County Recorder of Deeds to mail a copy of the recorded Deed of Release to the Garrs by including an instruction to that effect in the lower left-hand corner of the document. (LF120) (A25). This was the most "immediate" way Countrywide could release its lien and provide the Garrs with "evidence of the release," as the Garrs requested.

authority supporting this burden shifting theory, and the Garrs cite none. Id. Instead, the Garrs baldly argue that a shifting of the burden of proof is warranted because the mortgagor should not be "required to prove that all other entities who could constitute a 'person making satisfaction' did not receive a timely release." Id. This alarmist argument lacks merit because, as the statute indicates, there will be only one "person making satisfaction." If that "person" is not the mortgagor, the mortgagor will certainly know the person's identity. For example, in the instant case, the Garrs knew that Matrix Financial was the person who satisfied their debt to Countrywide. (LF21 at ¶ 6). Thus, contrary to the Garrs' argument, the mortgagor can easily satisfy this element if a statutory violation has occurred.

In sum, the record is devoid of evidence that Countrywide failed to timely deliver a sufficient deed of release to Matrix Financial, the "person making satisfaction" in this case. If the Garrs invoked the statute with their August 8, 2002 letter (which Countrywide disputes), they were required to prove such a failure in order to recover under § 443.130. Because the Garrs did not do so, the judgment of the trial court should be reversed.

### D. Section 443.130 is Void for Vagueness.

In the event the Court denies Countrywide's first two appeal points, it must consider whether § 443.130 is unconstitutionally vague.

As a threshold matter, the Garrs now question the Court's jurisdiction over this appeal. Specifically, the Garrs state that Countrywide invoked the Court's exclusive jurisdiction by claiming that § 443.130 is "somehow unconstitutional." Resp. Br. at 8. When Countrywide filed its appeal to this Court, however, the Garrs did not file suggestions in opposition as allowed by Rule 81.08(b). By not doing so, the Garrs tacitly acknowledged that the constitutional issue raised by Countrywide is not merely colorable, but real and substantial. This, of course, is the touchstone for this Court's exclusive jurisdiction in cases involving a constitutional issue. See, e.g., AG Processing, Inc. v. South St. Joseph Industrial Sewer District, 937 S.W.2d 319, 322 (Mo. Ct. App. 1996).

The Garrs suggest that jurisdiction in this Court is lacking because § 443.130 "has been around in some form since **the 19th Century.**" Resp. Br. at 8 (original emphasis). This misperceives Countrywide's constitutional argument. As stated on page 40 of Countrywide's Opening Brief, the vagueness problem with the statute stems in large part from its recent amendments in 1994 and again in 1996. The statute in its present form has only been in existence for approximately eight years. Thus, the statute's purported longevity does not undermine this Court's appellate jurisdiction as the Garrs now suggest.

Any concern the Court may have about its jurisdiction should be eliminated by the fact that § 443.130 is (apparently) even more unclear and confusing than

originally asserted by Countrywide. Indeed, as the parties' briefs vividly reflect, there is substantial disagreement over what is meant by the statutory phrase "the person making satisfaction." While Countrywide has always believed that at least this provision of the statute was sufficiently clear, especially in view of Masterson, the Garrs' contrary interpretation suggests otherwise. Put simply, the dispute between the parties regarding the meaning of the term "the person making satisfaction" further confirms the propriety of this Court's appellate jurisdiction as well as the unconstitutional vagueness of the statute.

The Garrs' suggestion that jurisdiction may be lacking is especially curious in view of their failure to fully address Countrywide's constitutional arguments. One point raised by Countrywide (and ignored by the Garrs) was the trial court's application of the statute against Countrywide even though Countrywide actually recorded the Deed of Release well before the date by which Countrywide was required to deliver a sufficient deed of release to the person making satisfaction. See Countrywide's Opening Brief at 44-45. Of course, by actually recording the Deed of Release, the purpose of the statute was met. See Ong Building Corp. v. GMAC Mortgage Corp. of Pa., 851 S.W.2d 54, 55 (Mo. Ct. App. 1993) ("[t]he purpose of § 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 of

record no longer exist[s].'") (citing Henry v. Orear, 78 S.W. 283, 284 (Mo. Ct. App. 1904)).

Nevertheless, the trial court construed the statute as still being applicable and imposed the penalty against Countrywide. As Countrywide understands the statute, the inherent predicate for liability under the statute is the continued existence of a lien after the lienor has been paid. Where, as here, the lienor promptly records a release, it would be utterly senseless to still require the lienor to deliver a sufficient deed of release to the person making satisfaction (whatever that may mean). Such actions would serve no purpose since the lien to be removed no longer exists. The statute is vague and confusing because it is unclear whether it is even applicable in situations like the present case.

At one point in their Brief, the Garrs complain that "[o]n August 26, 2002, without any actual notice to [them] . . ., [Countrywide] filed the deed of release with the St. Louis County Recorder of Deeds." Resp. Br. at 24. Setting aside the fact that Countrywide recorded the release in accordance with Mr. Garr's August 8, 2002 letter, the Garrs misperceive the intended purpose of § 443.130. As noted above, the statute is designed to achieve the actual release of old liens on the *public record*. It is not designed to provide *private notice* to borrowers. In any event, once Countrywide actually recorded the Deed of Release at its own expense, the Garrs had constructive notice of it.

As previously discussed by Countrywide, § 443.130 should be held void on vagueness grounds because it is internally inconsistent and, as a result, confusing. See Countrywide's Opening Brief at 40-42. When the statute was amended in 1994 to eliminate any recording requirement, the provision requiring the tender of "costs" was not removed. (A17). This created an incongruity because "costs," as that term is used in the statute, means the recorder of deeds' fee for releasing the deed of trust. See Murray, 936 S.W.2d at 215 (and cases cited therein). The problem was compounded two years later when the statute was amended again. The 1996 amendment divided the statute into three subsections, the second part of which contains a provision requiring that a proper demand letter include "the expense of filing and recording the release." (A20). This is perplexing given that any recording requirement was ostensibly *excised* from the statute in 1994.[10] This Court has appropriately invalidated other statutes that contain such contradictory provisions. See, e.g., Board of Education of the City of St. Louis v. State of Mo., 47 S.W.3d 366, 370-71 (Mo. 2001) (en banc).

[10] The parties are in agreement on this point. See Resp. Br. at 24 ("The legislature eliminated recording as a means of statutory compliance in the 1994 amendments."). See also LF14 at ¶ 5.

The Garrs try to salvage the statute by arguing that the provisions requiring the borrower to pay recording costs is:

> [M]erely the General Assembly's policy statement that before a demand may be made by the borrower for the deed of release, the borrower must pay to the lender the filing fee since the lender usually files the deed of release independent of providing the release to the borrower.

Resp. Br. at 31-32. This argument is flawed. First, the Garrs cite nothing to support their surmise that the legislature had such a "policy" in mind when it amended the statute. Second, and more important, the statutory language contradicts the Garrs' argument. Section 443.130.2 refers to "the expense of filing and recording *the release.*" Countrywide submits that "the release" is in reference to the "sufficient deed of release" mentioned in the first subsection of the statute. Thus, § 443.130 appears to require a borrower to pay the expense of filing and recording the "sufficient deed of release" -- not some other release which the Garrs now speculate a lender "usually files . . . independent of providing the release to the borrower."[11] Further, if the lender has already recorded a release independent

[11] It is unclear how a lender can "file[ ] and record[ ]" a sufficient deed of release (as § 443.130.2 seems to require), but yet deliver that *same* sufficient deed of release to the person making satisfaction (as § 443.130.1 seems to require).

of the borrower's statutory demand, § 443.130 should not even be applicable because the lender's lien no longer exists and, consequently, there is nothing to release. The Garrs' explanation is also deficient because it does not address what the lender is supposed to do with the costs tendered by a mortgagor in those instances where there is no recordation independent of the mortgagor's request.

Lastly, the statute is unconstitutionally vague because the requirements for a proper demand letter are not clearly set forth. In the instant case, Mr. Garr's August 8, 2002 letter did not refer to § 443.130 (or even Chapter 443 generally) and demanded several actions by Countrywide not required by the statute. While Countrywide did exactly as Mr. Garr requested, the trial court still found the statute to be applicable and penalized Countrywide for not complying with it. It is fundamentally unfair to impose such a penalty when actions *different* from those required by the statute have been requested.

Section 443.130 is impermissibly vague because of the uncertainty regarding when it is applicable and what actions must be taken by a lender to comply with its contradictory terms. This uncertainty is particularly troublesome in view of the statute's "highly penal" nature. Perrin, 124 S.W.2d at 555. The Court should, therefore, find the statute constitutionally void for vagueness.

### E. The Garrs Are Not Entitled To Prejudgment Interest.

In their cross appeal, the Garrs contend that the trial court erred by not awarding them prejudgment interest on the statutory penalty that Countrywide was ordered to pay. As discussed below, this contention is without merit.[12]

The Garrs assert that they should have been awarded prejudgment interest under § 408.020 because they were seeking to recover a liquidated or readily ascertainable amount. See Resp. Br. at 34. The Garrs further assert that such an award of prejudgment interest is mandatory, not discretionary. Id. at 35. These arguments ignore the nature of the underlying award in this case and applicable Missouri law.

It is undisputed that the Garrs sustained no actual damages as a result of Countrywide's purported failure to comply with § 443.130. Rather, the amount of the trial court's judgment in favor of the Garrs consists *solely* of the statutory *penalty*. No part of the judgment is compensatory in nature. Consequently, as a matter of law, the Garrs are not entitled to prejudgment interest.

This very issue was recently addressed in Hoskins v. Business Men's Assurance, 116 S.W.3d 557 (Mo. Ct. App. 2003). In that case, Mr. Hoskins

[12] This issue will be moot if the Court reverses the Final Judgment of the trial court as Countrywide requests.

contracted a rare form of lung cancer after working in a building owned by one of the defendants that contained asbestos fireproofing material Mr. Hoskins and his wife sued the defendants for personal injuries and loss of consortium. The jury awarded plaintiffs substantial amounts of actual and punitive damages. Id. at 559, 563. The defendants appealed, asserting that the trial court erred by awarding plaintiffs prejudgment interest on the $7 million punitive damages judgment. Id. at 579-80. Specifically, the defendants asserted that a prejudgment interest award on a judgment consisting solely of punitive damages did not serve the public policies on which § 408.040.2 is based. Id. at 580.

The court of appeals agreed, and reversed the award of prejudgment interest on the punitive damages judgment. The court started its analysis by examining § 408.040.2. It noted that, to determine the legislature's intent, it first had to consider the plain and ordinary meaning of the language used in the statute. The court then recognized:

> At the same time, we must keep in mind that "[t]he legislature is presumed, in enacting a statute, to intend a logical result," so we seek to avoid an unreasonable or illogical interpretation.

Id. at 580 (quoting Murray v. Missouri Highway & Transportation Commission, 37 S.W.3d 228, 234 (Mo. 2001) (en banc)).

Based on the terms of § 408.040.2, the court found no basis to disallow prejudgment interest on a punitive damages judgment. Id. at 580-81. The court then stated:

> But, when we consider the terms used in conjunction with the statute's purpose, we find that to allow for a prejudgment interest award on punitive damages would be an illogical or unreasonable result, which the legislature could not have intended.

Id. at 581. Citing Brown v. Donham, 900 S.W.2d 630, 633 (Mo. 1995) (en banc) and Call v. Heard, 925 S.W.2d 840, 849 (Mo. 1996) (en banc), the court explained its holding as follows:

> [T]he prejudgment interest statute seeks to make the Plaintiff whole. In contrast, the well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct. . . . Punitive damages do not compensate the plaintiff for any loss sustained as a result of the defendant's conduct and do not reflect amounts of money that the plaintiff would have had earlier but for the delays in litigation. The focus with regard to punitive damages is on punishing the

> defendant, not making the plaintiff whole. Accordingly, a judgment awarding prejudgment interest on punitive damages is wholly incompatible with the purposes behind prejudgment interest. To hold that by use of the broad terms of "claim" and "judgment" in section 408.040.2, our legislature intended to allow for prejudgment interest on a punitive damages award would effect an unreasonable, implausible or illogical result in light of the statute's purpose, which this court will not do.

Hoskins, 116 S.W.3d at 582 (internal quotations and citations omitted). It should also be noted that the holding in Hoskins is in accordance with the "prevailing view" in other jurisdictions. Id. at 581-82 (citing Belinski v. Goodman, 354 A.2d 92, 96 (N.J. Super. Ct. 1976)).[13]

The holding in Hoskins applies with equal force to the present case. The dollar amount of the trial court's Final Judgment is based solely on the penalty provided by § 443.130. Like the punitive damages judgment in Hoskins, the Final

[13] A thorough survey of the courts in other states that have considered this issue may be found at 9 A.L.R.5th 63 (1993).

Judgment contains no amount of actual damages. In fact, the Garrs presented no evidence that they sustained actual damages.[14] Having not suffered any actual loss, the Garrs do not need prejudgment interest to make them whole. Thus, as in Hoskins, this Court should reject the Garrs' cross appeal because it is "wholly incompatible with the purposes behind prejudgment interest." Hoskins, 116 S.W.3d at 582.

Without meaningful discussion, the Garrs assert that Hoskins is "inapposite" because it was a tort case decided under § 408.040 that involved a claim for an unliquidated sum. See Resp. Br. at 35 n.2. These are distinctions without a difference. Irrespective of the type of claim (*ex contractu* or *ex delicto*), or whether the claim is liquidated or not, the purpose of prejudgment interest is precisely the same. Indeed, in cases *not* involving § 408.040, the courts recognize that prejudgment interest is designed "to compensate for the true cost of money damages incurred" -- just as it is in cases decided under § 408.040. Davis v. Stewart Title Guaranty Co., 726 S.W.2d 839, 854 (Mo. Ct. App. 1987) (action to recover under policy of title insurance). See also Twin River Const. Co. v. Public

[14] In addition to the ten percent penalty, § 443.130.1 allows a plaintiff to recover "any other damages such person may be able to prove such person has sustained." (A11).

Water District, 653 S.W.2d 682, 695 (Mo. Ct. App. 1983) (action to recover balance due under construction contract; prejudgment interest "helps compensate plaintiffs for the true cost of money damages they have incurred"). In the instant case, the Garrs incurred no money damages. Instead, they were awarded a penalty to be paid by Countrywide. Under these circumstances, an award of prejudgment interest is unnecessary and entirely inconsistent with the purposes behind the prejudgment statutes. In addition, an award of prejudgment interest to the Garrs would impose yet a further penalty on Countrywide. Such an additional penalty is unwarranted.

The Garrs also suggest that they are entitled to prejudgment interest because § 408.020 is mandatory, not discretionary. See Resp. Br. at 35. Although § 408.020 does contain the word "shall," that does not mean it allows for the recovery of prejudgment interest on penalty and punitive damage awards. By comparison, § 408.040.2 is also mandatory because it, too, contains the word "shall." See Hurst v. Jenkins, 908 S.W.2d 783, 786 (Mo. Ct. App. 1995) (recognizing that if a proper demand or offer is made and the amount of a later judgment is greater, "the prevailing party *shall* be awarded prejudgment interest") (emphasis added). Notwithstanding the equally mandatory language in § 408.040.2, the court in Hoskins reversed the award of prejudgment interest on the punitive damages judgment. Similarly, it would be improper to award

prejudgment interest on the penalty in this case -- notwithstanding the mandatory language in § 408.020.

Should the Court conclude that the Garrs are entitled to prejudgment interest, it should not be calculated from August 8, 2002, as the Garrs incorrectly assert. See Resp. Br. at 35. August 8, 2002 is the date Mr. Garr mailed his demand letter to Countrywide. Countrywide did not receive the letter until August 12, 2002. (LF41 at ¶ 2; LF47). If the Court ultimately determines that Countrywide violated § 443.130, the violation occurred on September 4, 2002 (*i.e.*, the sixteenth business day after Countrywide's receipt of Mr. Garr's letter). Prejudgment interest would run from this later date, not August 8, 2002.

## CONCLUSION

For the reasons discussed herein and in Countrywide's Opening Brief, the Final Judgment of the trial court in favor of the Garrs and against Countrywide should be reversed. In the event the Final Judgment is not reversed by this Court, it should deny the Garrs' cross appeal for prejudgment interest.

Respectfully submitted this ____ day of January, 2004.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed, first class, postage prepaid, to the person listed below this ____ day of January, 2004.

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## CERTIFICATE OF COMPLIANCE WITH RULES 84.06(c) AND (g)

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief are 7,818. The undersigned relied on the word count feature of his firm's word-processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free.