

MISSOURI SUPREME COURT

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Appeal No. SC 88762

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Lisa L. Rokusek,  
Jennifer Human,  
*Appellants,*

v.

Security Title Insurance Company,  
Security Title Insurance Agency  
*Respondents.*

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# **Appellants’ Substitute Brief**

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## JURISDICTIONAL STATEMENT

Plaintiffs filed this case in the Circuit Court of St. Louis County alleging violation of the Missouri Notary Public Statute, unjust enrichment, and violation of the Missouri Merchandising Practices Act. Plaintiffs alleged that defendants overcharged them for notary services. The trial court granted defendants' motion for summary judgment on October 17, 2006. The motion raised no issue concerning the validity of the statutes. Plaintiffs timely filed their notice of appeal. The appeal raised no issue in the exclusive appellate jurisdiction of the Missouri Supreme Court therefore the Missouri Court of Appeals had original appellate jurisdiction. Mo. Const. art. V, § 3. After opinion, this Court granted plaintiffs' transfer motion therefore this Court now has jurisdiction. Mo. Const. Art. V, § 10.

## STATEMENT OF FACTS

The trial court decided this case by granting summary judgment to the defendants, Security Title Insurance Agency and Security Title Insurance Company (collectively “Security Title”). (L.F. 114). Lisa Rokusek and Jennifer Human (collectively the “plaintiffs”) admitted all of Security Title’s statements of uncontroverted facts in its summary judgment motion. (L.F. 72-73). Thus, there should be no disputes about the facts.

Plaintiffs filed a three count petition against Ticor Title Insurance Company d/b/a Security Title. (L.F. 1). A couple of weeks later, plaintiffs filed an amended petition adding Security Title Insurance Agency and Security Title Insurance Company as defendants. (L.F. 1). Plaintiffs voluntarily dismissed Ticor after Security Title admitted that it, not Ticor, provided the notary services at plaintiffs’ real estate closing. (L.F. 71).

The amended petition had three counts: violation of the Missouri Notary Public Statute, unjust enrichment, and violation of the Missouri Merchandising Practices Act. (L.F. 5-14). All three counts share the same basic facts. Plaintiffs, on their own behalf and on behalf of all others similarly situated, alleged that they refinanced their home and that Security Title provided the notary public services at the closing of the refinancing. Plaintiffs alleged that because Security Title did not do everything required

by the Missouri Notary Public Statute necessary to earn a \$2 per signature fee, it overcharged them. (L.F. 5-14).

The only facts material to this appeal are that Security Title notarized ten signatures and charged plaintiffs \$12. (L.F. 18-19, 72-73). And that Security Title did not record any of the signatures that it notarized in its notarial journal<sup>1</sup>. (L.F. 64-65).

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<sup>1</sup> Security Title claims to have admitted this fact only for purposes of the summary judgment motion. (L.F. 65).

## POINTS RELIED ON

- I. The trial court erred in granting Security Title's summary judgment motion on the violation of the Missouri Notary Public Statute claim because Security Title charged \$12 for notarizing ten signatures that it failed to record in its journal in that the statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in the journal.

*Jefferson County Fire Protection Dis't. v. Blunt*, 205 S.W.3d 866

(Mo. banc 2006);

*J.S. v. Beaird*, 28 S.W.2d 875 (Mo. banc 2000).

- II. The trial court erred in granting Security Title's summary judgment motion on plaintiffs' common law unjust enrichment claim because that common law claim is not preempted by the Missouri Notary Public Statute in that there is no requirement that common law liability preexist statutory liability to escape preemption, and even if that proposition were true, notaries public had common law liability that predated the Missouri Notary Public Statute.

*First Bank of Childerburg v. Florey*, 676 So.2d 324 (Ala. Civ. App.

1996);

*Gales v. Weldon*, 282 S.W.2d 522 (Mo. 1955);

*In Re Thigpen v. Matrix Financial Services*, No. 02-14280MAM13,  
2004 Bankr. LEXIS 1135 (Bankr. S.D. Ala. May 25, 2004);

*State ex rel. Workingmen's Banking Co. v. Edmunds*,  
66 Mo. App. 46 (Mo.App. 1896).

- III. **The trial court erred in granting Security Title's summary judgment motion on the Missouri Merchandising Practices Act (MMPA) claim because the Missouri Notary Public Statute does not preempt MMPA claims in that the legislature intended the remedies of the statutes to complement each other not to preempt each other.**

*Commerce Bank of Kansas City v. Missouri Dept. of Finance*,  
762 S.W.2d 431 (Mo.App. 1988);

*Dover v. Stanley*, 652 S.W.2d 258 (Mo. App. 1983);

*State ex rel. Fort Zumwalt School Dis't v. Dickherber*,  
576 S.W.2d 532 (Mo. banc 1979);

*State ex rel. Webster v. Myers*, 779 S.W.2d 286 (Mo. App. 1989).

## ARGUMENT

I. The trial court erred in granting Security Title's summary judgment motion on the violation of the Missouri Notary Public Statute claim because Security Title charged \$12 for notarizing ten signatures that it failed to record in its journal in that the statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in the journal.

Standard of review: The trial court granted Security Title's summary judgment motion. "Appeals from a grant of summary judgment are essentially reviewed *de novo*. To be entitled to summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that the movant is entitled to summary judgment as a matter of law." *Jefferson County Fire Protection Dis't. v. Blunt*, 205 S.W.3d 866, 868 (Mo. banc 2006). Here, there is no dispute as to material facts, so this Court only need evaluate if Security Title is entitled to summary judgment as a matter of law. This standard of review applies to all three points relied on.

Plaintiffs alleged that Security Title overcharged them for notary fees because notaries can only be paid \$2 per signature if they notarize the signature *and* record it in their journal.<sup>2</sup> Security Title admitted that it

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<sup>2</sup> Plaintiffs' petition also alleged that there were an insufficient number

notarized ten signatures but did not record any in its journal. As such, the \$12 fee that Security Title charged was excessive because, as will be explained below, the absolute maximum that Security Title could have charged was \$1 per signature for a total of \$10.

Security Title was not entitled to charge \$2 per signature because it did not perform the work that the statute requires to charge that fee. In relevant part, §486.350, RSMo., states:

1. The maximum fee in this state for notarization of each signature *and the proper recording thereof in the journal of notarial acts* is two dollars for each signature notarized. (Emphasis added.)
  
3. The maximum fee in this state is one dollar for any other notarial act performed.
  
5. A notary public who charges more than the maximum fee specified ... is guilty of official misconduct.

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of signatures notarized by Security Title to support its fee even if it were allowed to charge \$2 per signature. That issue is not on appeal.

“The cardinal rule of statutory construction is that the intention of the legislature in enacting the statute must be determined and the statute as a whole should be looked to in construing any part of it. Words are to be given their plain and ordinary meaning whenever possible.” *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. banc 2000).

The undisputed facts are that Security Title charged \$12 for notarizing ten signatures but did not record any in its notary journal.

The legal issue is whether Security Title overcharged plaintiffs. The language in §486.350(1), RSMo., is plain and unambiguous. Notaries must do *two* things to charge a \$2 per signature fee. First, they must notarize a signature. Second, they must record the signature in their journal. If they do not perform these two acts they cannot charge a \$2 per signature fee. Security Title has conceded that none of the signatures were recorded in journals. (L.F. at 64-65). Therefore, it cannot collect \$2 per signature.

This interpretation is consistent with the views of the relevant administrative agency. The Missouri Secretary of State issued a “Document Certification Services” handbook to assist notaries in performing their duties. This handbook not only outlined the two obligations appearing above, it emphasized that *both* obligations must be performed to collect two dollars: “The notary is allowed by law to charge a fee of \$2.00 for each signature

notarized and RECORDED IN THEIR NOTARY JOURNAL.” (Capitalization in original.) (Appendix at 23.) This interpretation has been consistently held by whomever has been elected Secretary of State. (Appendix at 29.)

The only real issue is whether Security Title can collect \$1 per signature under §486.350(3), RSMo., or are instead precluded from charging anything. Under either scenario, the trial court improperly granted summary judgment because, at maximum, Security Title could have charged \$10 for notarizing ten signatures but it charged \$12.

Section 486.350(3), RSMo., allows notaries to charge one dollar for “any other notarial act performed.” The \$1 charge for “any other notarial act performed” in §486.350(3), RSMo., is reserved for notarial acts other than notarizing signatures. Subsections one and two of this statute apply to notarizing signatures thus the reference in subsection three to “other” acts must refer to things other than notarizing signatures. For example, notaries may take acknowledgments, administer oaths and affirmations, and certify that a copy of a document is a true copy of another document. §486.250, RSMo. Those are the acts that fall within the realm of the \$1 charge in §486.350(3), RSMo. Performing an incomplete act, like Security Title in this case, is not the type of act that subsection three contemplates. It would create an incentive for notaries not to comply with the journal recording

requirement. That could not have been the intent of the legislature. Thus, Security Title was not entitled to charge anything for its incomplete acts.

The last issue is whether Security Title is liable for its notaries' overcharge. Again, the statute is clear. Section 486.360, RSMo., provides that a notary's employer is liable for a notary's "official misconduct." Section 486.350(5), RSMo., provides that "a notary who charges more than the maximum fee specified ... is guilty of official misconduct." Here, the notaries charged more than what they were allowed and thus were guilty of official misconduct for which their employer is liable.

Furthermore, "official misconduct" is also more generally defined in the definition portion of the Missouri Notary Public Statute. The definition section provides that:

[a]s used in sections 486.200 to 486.405 'official misconduct' means the wrongful exercise of a power or the wrongful performance of a duty. The term 'wrongful' as used in the definition of official misconduct means unauthorized, unlawful, abusive, negligent, reckless, or injurious.

§486.200(6), RSMo. Therefore, charging more than the maximum fee is one type of official misconduct but so is the unauthorized, unlawful or injurious exercise of a power or wrongful performance of a duty. Failure to record signatures in a journal, as required by law to earn a \$2 per signature fee, is unauthorized, unlawful and injurious and thus it is also official misconduct in the more general sense. Consequently, Security Title is liable for the overcharges made by its notaries.

The trial court erred in granting summary judgment on the violation of the Missouri Notary Public Statute. The judgment should be reversed and the case remanded

**II. The trial court erred in granting Security Title's summary judgment motion on plaintiffs' common law unjust enrichment claim because that common law claim is not preempted by the Missouri Notary Public Statute in that there is no requirement that common law liability preexist statutory liability to escape preemption, and even if that proposition were true, notaries public had common law liability that predated the Missouri Notary Public Statute.**

Security Title contends that plaintiffs' unjust enrichment claim (count II) fails because it is preempted by the Missouri Notary Public Statute, §486.200, *et. seq.* The trial court's order does not state whether it entered

judgment on this count based on preemption or because there can be no unjust enrichment if Security Title did not overcharge for its services. (L.F. 114). Plaintiffs will address only the preemption issue here as it has already addressed the proper charge issue in Point I.

Security Title argues that the common law unjust enrichment claim is preempted by the statute because, to escape preemption, a notary public's common law liability must have preexisted the statute. There are two problems with Security Title's argument: its premise is wrong and the facts don't support the premise. First, there is no requirement that common law liability predate statutory liability to escape preemption. Second, even if there were, notaries public had liability at common law that predated the statute.

To advance its legal premise that statutory liability preempts the common law, Security Title relies on *Gales v. Weldon*, 282 S.W.2d 522, 529 (Mo. 1955). In *Gales*, the plaintiff sued for compensatory and punitive damages under Chapter 409 of Missouri's Securities Law. On appeal the plaintiff argued that he was entitled to punitive damages. The Court disagreed, finding that no provision in the Missouri Securities Law allowed for punitive damages. The court instructed that "[i]f plaintiff had so desired he could have brought an action for damages for fraud and upon a proper

showing could have recovered punitive as well as his actual damages.” *Id.* at 528-29. Thus, contrary to Security Title’s assertion, *Gales* found that the plaintiff *could* have asserted complementary statutory causes of action under Missouri’s Securities Laws along with common-law fraud claims. Similarly, in this case, plaintiffs are alleging complementary statutory and common-law claims. Under Security Title’s own authority, one claim does not preempt the other.

Security Title contended, without citation to any authority, that “the Notaries Public Act establishes the ‘whole matter of right and remedy’ regarding maximum charges for notary services.” (L.F. at 66). A notary’s liability, in fact, originated in common law and predated the statute. The Missouri Notary Public Statute governs a notary’s qualifications, duties, and liabilities. Although predecessor statutes date back to the 19th Century, the notary public is an ancient position whose qualifications, duties, and liabilities were established by common law. *See, generally, Closen & Dixon, Notaries Public From The Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D.L. Rev. 873 (1992). “The liability of a notary public is founded on the common law and predates any statutory duty.” *In Re Thigpen v. Matrix Financial Services*, No. 02-14280MAM13, 2004 Bankr. LEXIS 1135 at 5 (Bankr. S.D. Ala. May 25, 2004) (compiling authority from

many jurisdictions); *First Bank of Childerburg v. Florey* 676 So.2d 324, 331 (Ala. Civ. App. 1996) (finding common law notary liability even after statutory liability was repealed); *Independence Leasing v. Aquino*, 445 N.Y.S.2d 893, 894 (N.Y. Civ. Ct. 1981) (statutory and common law liability coexist); *Figures v. Fly*, 193 S.W. 117, 120 (Tenn. 1916) (statutory and common law liability coexist); *Clapp v. Miller*, 156 P. 210, 211 (Okla. 1916) (notary has common law liability). Plaintiffs have found no cases and Security Title has not cited any case claiming that a notary has no common law liability. Nor is there a case from any jurisdiction holding that a statutory, notary public law preempts common law liability. Security Title is asking this Court to do something that no other court has ever done, i.e., hold that notary statute preempts common law liability.

The only Missouri case addressing the issue of a notary's common law liability held: "Neither this provision, nor the other sections of the statute defining the general powers and duties of notaries public and regulating their fees add anything to their official duty in their protest of negotiable paper as existing at common law. By the law merchant, as well as under our statute, the notary would be liable ...." *State ex rel. Workingmen's Banking Co. v. Edmunds*, 66 Mo. App. 47, 51 (Mo.App. 1896). Therefore, Missouri recognized

common law liability for notary misconduct and the common law unjust enrichment claim is not preempted.

For these reasons, the summary judgment order should be reversed and the case remanded.

**III. The trial court erred in granting Security Title's summary judgment motion on the Missouri Merchandising Practices Act (MMPA) claim because the Missouri Notary Public Statute does not preempt MMPA claims in that the legislature intended the remedies of the statutes to complement each other not to preempt each other.**

Security Title took a different approach to preemption on plaintiffs' MMPA claim. It argued that the Missouri Notary Public Statute preempts MMPA claims because the Missouri Notary Public Statute is more specific than the MMPA and more specific statutes control over general statutes. (L.F. at 67). Security Title cited a litany of cases (none of which deal with preemption) for the general proposition that "a statute having a general application will be subordinated to one having a more specific application." This is true but only where the two statutes cannot be harmonized. As the very case on which it places so much emphasis explained: "Where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the

extent of any repugnancy between them the definite prevails over the general.” *State ex rel. Fort Zumwalt School District v. Dickherber*, 576 S.W.2d 532, 536-7 (Mo. banc 1979). Security Title has not even attempted to show how the Missouri Notary Public Statute conflicts with the MMPA. The statutes do not conflict and thus both are available to plaintiffs.

When Missouri adopted the MMPA, it sought to add another arrow in the quiver of consumer right. It did not intend to throw away the other arrows. Section 407.120, RSMo, entitled “Provisions of this chapter no bar to other civil actions,” states that the MMPA “shall not bar any civil claim against any person who has acquired any moneys or property, real or personal, by means of any practice declared to be unlawful by this chapter.” Likewise, the Notaries Public Act contains no language that even hints that it is the exclusive remedy for claims against notaries. The two statutes complement each other and can be used together.

Security Title also relies heavily on *Dover v. Stanley*, 652 S.W.2d 258 (Mo.App. 1983). That case is easily distinguishable. In *Dover*, this Court analyzed two sections of the MMPA that were enacted at the same time. One dealt generally with misleading practices §§407.010-407.307, RSMo. and the other dealt specifically with the misleading practice of odometer tampering §§407.510-407.556, RSMo. In trying to interpret legislative intent, this Court

held that because the legislature created a specific civil remedy for odometer tampering in the same statute and at the same time that it created a general remedy for misleading practices, the legislature must have intend for plaintiffs to sue only under the specific statute dealing with odometer tampering.<sup>3</sup>

*Dover* is not on point. First, the *Dover* court emphasized that it was reviewing two portions of the same statute enacted at the same time. By enacting a general and a specific provision in the same statute at the same time, the Court surmised the legislature must have intended the more specific to control over the more general. Second, the Court later rejected a *Dover*-like preemption attack explaining that “[t]he rule of *Dover v. Stanley*, however, assumes a repugnancy between the two statutes.” *Commerce Bank of Kansas City v. Missouri Dept. of Finance*, 762 S.W.2d 431, 436 (Mo.App. 1988). Here, there is no repugnancy between the MMPA and the Missouri Notary Public Statute and *Dover* does not apply.

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<sup>3</sup> Interestingly, the court misread the true legislative intent and the legislature quickly overturned *Dover* by legislative enactment. *See, State ex rel. Webster v. Myers*, 779 S.W.2d 286, 287-88 (Mo.App. 1989).

## CONCLUSION

For all of these reasons, this Court should reverse the trial court's granting of Security Title's summary judgment motion on all three counts. It should remand the case to the trial court for prosecution on its merits.

Respectfully submitted,

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