MISSOURI SUPREME COURT

Appeal No. SC 88762

Lisa L. Rokusek,
Jennifer Human,
Appellants,

v.

Security Title Insurance Company, L.L.C.,
Security Title Insurance Agency, L.L.C.,
Respondents.

RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Respondents Security Title Insurance Agency, L.L.C., and Security Title Insurance Company, L.L.C. (collectively, "Security Title"),[1] hereby adopt the jurisdictional statement appearing on page 5 of Appellants' Substitute Brief.

[1] Security Title Insurance Company, L.L.C., changed its name to Security Title Insurance Agency, L.L.C., by an amendment to its Articles of Organization dated August 22, 1996. There is no separate entity known as Security Title Insurance Company, L.L.C.

STATEMENT OF FACTS

Security Title hereby adopts the Statement of Facts appearing on pages 6 and 7 of Appellants' Substitute Brief.

SUMMARY OF THE ARGUMENT

This appeal presents this Court with the question of whether the Missouri Notaries Public Act, Mo. Rev. Stat. §§ 486.200 – 486.405 (2002), permits a private right of action for overcharging when a notary charges $2.00 for notarizing a signature and allegedly fails to record such notarization in a journal of notarial acts. The Missouri Court of Appeals for the Eastern District, as well as three trial courts, correctly answered this question with an emphatic "no." None of those courts erred and the judgment below should be affirmed.

The facts of this case are undisputed, at least for purposes of the Motion for Summary Judgment granted and affirmed below, and they establish that Security Title notarized ten (10) signatures for Appellants. Pursuant to the Notaries Public Act, notarizing those ten signatures entitled Security Title to charge a maximum fee of $20.00, or $2.00 per signature. It is undisputed that Security Title charged Appellants only $12.00 (*i.e.* approximately $1.20 per signature). Consequently, Appellants concede that they have no claim if the Act allows Security Title to charge $2.00 per notarized signature, regardless of whether that signature is also recorded.

With these undisputed facts in mind, it is crucial for this Court to recognize at the outset what is ***absent*** from the record evidence. There is no evidence that anyone has challenged the authenticity of Appellants' signatures. There is no evidence that the signatures notarized by Security Title were fraudulent. There is no evidence that there were any improprieties in the notarizations themselves. There is no evidence that Appellants suffered any loss proximately caused by improprieties in the notarizations

performed by Security Title. Similarly, the record is devoid of any evidence suggesting that Appellants did not get exactly what they bargained for: notarized signatures that allowed them to refinance their home. Rather, the ***sole basis*** for all of Appellants' claims derives from the allegation that Security Title was entitled to no payment whatsoever merely because its notaries allegedly failed to record the notarized signatures in a journal of notarial acts. In other words, Appellants argue that they should receive the benefit of Security Title's notarizations free of charge because those notarizations were not recorded.

The fundamental question faced by this Court, then, is whether the failure to enter a signature into the notary journal will by itself support a private cause of action by the person whose signature was notarized, when that failure results in absolutely no harm whatsoever to the signatory. The answer to this question is a resounding "no" for two reasons. First, the Notaries Public Act expressly provides that the maximum fee is "two dollars for each signature notarized." Mo. Rev. Stat. § 486.350(1). The decision below should be affirmed for this reason alone, since Appellants concede that Security Title charged them less than $2.00 per notarized signature. In their Substitute Brief, Appellants rehash the same argument rejected by the Court of Appeals that Security Title is not entitled to compensation for these notarizations because it allegedly failed to record them in a notarial journal. However, as recognized below by the Court of Appeals, the plain language of the Notaries Public Act does not support Appellants' interpretation of the Act, but merely clarifies that notaries may not charge an additional fee beyond the $2.00 for recording. Thus, the Act provides that notaries may be compensated up to

$2.00 per signature regardless of whether they record such notarizations in a notarial journal.

Second, Appellants have not and cannot show that they suffered "damages proximately caused" by "official misconduct" on the part of Security Title. After all, although the Notaries Public Act explicitly provides that charging more than $2.00 per signature will support a private action for "official misconduct," it contains no similar provision for the mere failure to record a signature, since the Act nowhere classifies a failure to record as "official misconduct." This reading of the Act was followed by ***all three*** Circuit Courts faced with this issue, including the trial court below.

Moreover, this Court need not even reach that issue of statutory interpretation if it affirms the finding of the trial court below that Appellants – who, again, were able to refinance their home as a result of the signatures notarized by Security Title – have absolutely no evidence that they were harmed by any failure to record in the manner contemplated by the Act's private right of action provision. In other words, this appeal can be decided in Security Title's favor based solely on the absence of any record evidence establishing any harm to Appellants. To hold that Appellants have somehow been harmed by any failure to record would be to ignore the prevailing case law, the doctrine of substantial statutory compliance, common sense, and fundamental principles of fairness.

Because Appellants' claim under the Notaries Public Act fails, their purely derivative claims for unjust enrichment and violations of the Missouri Merchandising Practices Act fail as well.

Accordingly, this Court should affirm the trial court, and affirm the entry of summary judgment in favor of Security Title.

ARGUMENT

This appeal is one of three currently pending before this Court that involve alleged violations of the Notaries Public Act, Mo. Rev. Stat. § 486.350. See Lisa L. Rokusek and Jennifer Human v. Commonwealth Land Title Ins. Co., SC88763; James M. Finnegan v. Old Republic Title Co. of St. Louis, Inc., SC88761. In all three actions, appellants contend that they were overcharged by respondent title companies for notary services and assert that they are entitled to recovery pursuant to the Notaries Public Act, common law unjust enrichment principles, and/or the Missouri Merchandising Practices Act ("MMPA"). In all three actions, respondents were granted summary judgment on all counts at the trial court level. See Appellants' Sub. Br. at A-2, Judgment, Lisa L. Rokusek and Jennifer Human v. Security Title Ins. Co., Cause No. 06CC-001255 (21st Jud. Cir. Mo. Oct. 17, 2006); see also, infra, A1-A6, Judgment and Order, The Honorable Steven H. Goldman, James M. Finnegan v. Old Republic Title Co. of St. Louis, Inc., Cause No. 06CC-001171 (21st Jud. Cir. Mo. Oct. 30, 2006); Judgment, The Honorable John F. Kintz, Lisa L. Rokusek and Jennifer Human v. Commonwealth Land Title Ins. Co., Cause No. 06CC-1256 (21st Jud. Cir. Mo. Nov. 8, 2006). Finally, in all three actions, the Eastern District Court of Appeals affirmed summary judgment below. See, infra, A7 –A15, Lisa L. Rokusek and Jennifer Human v. Security Title Ins. Co., 2007 WL 1814294 (Mo. Ct. App. 2007); Lisa L. Rokusek and Jennifer Human v. Commonwealth Land Title Ins. Co., 2007 WL 1858243 (Mo. Ct. App. E.D. 2007); James M. Finnegan v. Old Republic Title Co. of St. Louis, Inc., 2007 WL 1814303 (Mo. Ct. App. E.D. 2007).

On appeal, Appellants in this case (as well as in Commonwealth and Old Republic) essentially rehash what was argued to and rejected by three trial courts and the Eastern District Court of Appeals. For the reasons explained below, these stale arguments should be rejected once again by this Court and summary judgment in Security Title's favor should, once again, be affirmed.

I. Standard of Review

Security Title concurs with Appellants' statement that the Court is to review Security Title's Motion for Summary Judgment *de novo*. (Appellants' Sub. Br. at 10.) Security Title also agrees that in order to affirm summary judgment in its favor, the Court must find (1) no genuine issue of material fact; and (2) that Security Title is entitled to summary judgment as a matter of law. (Id.)

Appellants note in their Substitute Brief that they admitted all of the statements of uncontroverted fact presented by Security Title in its Motion for Summary Judgment. (Id.) The record also reflects that Appellants alleged no additional uncontroverted facts in their Memorandum in Opposition to Security Title's Motion for Summary Judgment. (See L.F. 74-83.) Moreover, as demonstrated below, on the undisputed record evidence, each of the three Counts of Appellants' Petition fails as a matter of law. As a result, the Court should affirm summary judgment in Security Title's favor on all Counts.

II. The trial court did not err in granting summary judgment in Security Title's favor on Appellants' claim under the Missouri Notaries Public Act (Count I of Appellants' Petition), because Appellants cannot on the undisputed record evidence satisfy the essential elements for a private cause of action under the Act, in that the plain language of the Act demonstrates that recording in a journal is not a prerequisite to charging $2.00 for notarization and in that Appellants cannot show that Security Title committed "official misconduct" or "proximately caused" Appellants damage. (Response to Appellants' Point Relied on I.)

In Count I of their Petition, Appellants seek to recover notary fees pursuant to Section 486.350(1) of the Notaries Public Act (Mo. Rev. Stat. § 486.350). Because Appellants cannot, on the undisputed record evidence, satisfy each of the essential elements of such a claim, the trial court properly granted Security Title's Motion for Summary Judgment.

Appellants concede that they can only prevail on their claim if Section 486.350(1) requires notaries to ***both*** notarize documents ***and*** record the notarization in a journal as prerequisites to collecting up to $2.00 per notarization. As detailed below in Section II.A, Appellants' claim fails as a matter of law because the statute's plain language does not support Appellants' interpretation of Section 486.350.

As detailed below in Section II.B, Appellants' claim also fails because Appellants have not and cannot show that they suffered "damages proximately caused" by Security

Title's "official misconduct" pursuant to Section 486.355 of the Notaries Public Act (Mo. Rev. Stat. § 486.355). As satisfying Section 486.355's requirements is a necessary prerequisite to recovering for alleged violations of Section 486.350 of the Act, the Court should affirm summary judgment in Security Title's favor on Count I of Appellants' Petition. Finally, as detailed in Section II.C below, Appellants' attempted introduction of materials authored by the Missouri Secretary of State's Office is inappropriate and not supportive of Appellants' position, and therefore should be disregarded by the Court.

A. Appellants' claim under the Notaries Public Act fails because recording notarizations in a journal is not a prerequisite to charging "two dollars for each signature notarized" under the plain language of Section 486.350(1) of the Act.

Appellants' claim in Count I of their Petition pivots on their misguided contention that recording in a notary journal is a necessary prerequisite to charging up to $2.00 for notarizing a signature. This interpretation is directly belied by the plain language of the Notaries Public Act. As a result, Appellants' claim fails as a matter of law and summary judgment should be affirmed in Security Title's favor.

Section 486.350(1) of the Notaries Public Act provides that "[t]he 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." Mo. Rev. Stat. § 486.350(1). In affirming summary judgment in Security Title's favor below, the Eastern District Court of Appeals held that Section 486.350 ***"serves to prohibit a notary from charging an additional fee for recording the notarial act in a journal" rather than imposing a***

"recording requirement as a prerequisite to charging the $2 fee." Security Title, 2007 WL 1814294, at *3; see also Old Republic, 2007 WL 1814303, at * 3. In other words, as the "two dollars for each signature notarized" language makes clear, Section 486.350 ***imposes a cap on charges for notarizing and/or recording notarized signatures*** – it does not require notaries to ***both*** notarize ***and*** record in order to collect a $2.00 fee as Appellants contend. Absent that clarification, as detailed, infra, in Section III of this Substitute Brief, notaries could charge $2.00 for a notarization, and an additional $1.00 under subsection (3) of the same statute for the "notarial act" of entry into the notary journal. See Mo. Rev. Stat. § 486.350(3).

This interpretation is bolstered by language appearing in Section 486.260 of the Act. In its current form, Section 486.260 states that "each notary shall provide and keep a permanently bound journal of his or her notarial acts containing numbered pages …." Mo. Rev. Stat. § 486.260 (2004). As pointed out by the Court of Appeals below, the section goes on to carve out exceptions to this recording requirement, including "those connected with judicial proceedings, and those for whose public record the law provides and the public record is publicly filed within ninety days of execution." Id. Based on this carve out, the Court of Appeals rejected Appellants' interpretation of Section 486.350 because, "[i]f Plaintiffs' argued interpretation of Section 486.350 were applied, the Notary Act would prohibit notaries from charging a fee for these excepted acts, a result obviously not intended." Security Title, 2007 WL 1814294, at *2 (citing Investors Title Co., Inc. v. Hammonds, 217 S.W. 3d 288, 295-96 (Mo. banc 2007) (statutes involving related subject matter are to be construed together in order to determine their

meaning), and Bowen v. Missouri Dep't of Conservation, 46 S.W. 3d 1, 10 (Mo. Ct. App. 2001) (statutes should not be interpreted in manner which will render some of their phrases to be mere surplusage and courts must presume every word has meaning and purpose)); see also Old Republic, 2007 WL 1814303, at * 3. In other words, if Appellants were correct, notaries would be prohibited from receiving compensation for notarizing any "carve out documents" under Section 486.350 if they ***followed the law*** (Section 486.260) and refrained from recording such notarizations in a notary journal. Because Appellants' proposed interpretation of the statute would, if adopted, create statutory incongruities, that interpretation should be rejected as completely illogical.

As a result, the Court should affirm summary judgment in Security Title's favor on Count I of Appellants' Petition.

B. Appellants' claim under the Notaries Public Act fails because Appellants have not and cannot show that they suffered "damages proximately caused" by "official misconduct" committed by Security Title.

The Court should also affirm summary judgment in Security Title's favor because Appellants have not and cannot show that they meet the requirements of Section 486.355 of the Act (Mo. Rev. Stat. § 486.355). Section 486.355 "spells out exactly when a notary and his surety are liable for damages" under the Notaries Public Act. Means v. Clardy, 791 S.W. 2d 433 (Mo. Ct. App. 1990). Under Section 486.355, a notary public and his or her surety "are liable to the persons involved ***for all damages proximately caused*** by a notary's ***official misconduct***." Mo. Rev. Stat. § 486.355 (emphasis added). In other

words, Appellants must satisfy two criteria in order to prevail on their claim under the Notaries Public Act: (1) Appellants must show that Security Title committed "official misconduct" by charging Appellants $12.00 for notarizing ten signatures; ***and*** (2 Appellants must show that being charged $12.00 for ten signatures "proximately caused" them damage. As detailed below, the undisputed record evidence establishes that Appellants cannot satisfy either of these requirements, much less both of them. As a result, the Court should affirm summary judgment in Security Title's favor on Count I of Appellants' Petition.

1. Appellants have not and cannot establish that Security Title committed "official misconduct" by charging Appellants $12.00 for notarizing ten signatures.

Appellants' claim fails as a matter of law because, on the undisputed record evidence, they have not and cannot establish that Security Title committed "official misconduct" pursuant to Section 486.355 of the Notaries Public Act. Accordingly, the trial court properly granted Security Title summary judgment on Count I of Appellants' Petition.

Again, Appellants contend that Security Title violated Section 486.350(1)'s $2.00 per signature fee limitation by charging Appellants $12.00 for notarizing ten signatures without also recording those notarizations in a notary journal. However, even assuming Security Title failed to record the fact of notarization in a notary journal, the Notaries Public Act does not provide that charging for notarization without recording constitutes "official misconduct" that can support a private action.

Appellants rely upon the general definition of "official misconduct," as found in Mo. Rev. Stat. § 486.200(6), to argue that the "[f]ailure to record signatures in a journal … is unauthorized, unlawful and injurious and thus is … official misconduct in the more general sense." (Appellants' Sub. Br. at 15.) Reading the general definition to apply to the failure to record a signature in the notary journal, however, ignores both the plain language and the statutory structure of the Act. Indeed, not one but two sections of the Act refute Appellants' contention that Security Title committed "official misconduct": Section 486.350, which establishes maximum fees, and Section 486.260, which establishes the requirement to keep a journal.

Section 486.350 of the Act, titled "Maximum fees--overcharges or charge for absentee ballots, effect of," establishes that "[a] notary public who charges more than the maximum fee specified or who charges or collects a fee for notarizing the signature on any absentee ballot or absentee voter registration is guilty of official misconduct." Mo. Rev. Stat. § 486.350(5). The maximum fee at issue here is established by subsection (1), which provides that "[t]he 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." Thus, by its plain language, Section 486.350 operates to proscribe charges in excess of the maximum fee for notarized signatures - $2.00 for each signature notarized – and to establish that any charges in excess of $2.00 constitute "official misconduct."

By contrast, Section 486.260, as implied by its title, "Notary to keep journal," establishes the requirement of the notary to keep a journal. Notably, however, the

Legislature chose not to establish that the failure to keep such a journal would constitute "official misconduct." In fact, there is no provision anywhere in the Act that establishes or even implies that the failure to keep a notary journal constitutes "official misconduct."

The Act's language and framework thus demonstrate that the Legislature enacted Section 486.350 to establish maximum fees, and explicitly provided that that charges in excess of such fee would constitute "official misconduct." The Legislature also chose to establish a requirement to keep a journal, set forth in Section 486.260, but chose not to classify any failure under Section 486.260 as "official misconduct." Appellants' contrary reading of the statute is therefore without merit.

This conclusion is bolstered by recent amendments to the Act. When Appellants refinanced their home on September 5, 2003, the requirement to keep a journal was controlled by the 2002 version of Section 486.260, which simply stated that "[e]ach notary public shall provide and keep a permanently bound journal of his notarial acts containing numbered pages." Mo. Rev. Stat. § 486.260 (2002). Although the Legislature subsequently amended the statute in 2004 to further specify the recording requirement (see supra, Section II.A), it added no language classifying a failure to record notarized signatures in a notary journal as "official misconduct." See Mo. Rev. Stat. § 486.260, Appellants' Sub. Br. at A-7. That the Legislature made no such classification, despite having the opportunity to do so, further demonstrates that any such failure does not constitute official misconduct.

Alternatively, even assuming that Security Title did not record the notarization of Appellants' documents in a notary journal and that a lack of recording technically

violates the Notaries Public Act, the Court should affirm summary judgment in Security Title's favor because Security Title substantially complied with Section 486.350's requirements. "Substantial compliance" with the Notaries Public Act "is all the law demands." Warder v. Henry, 23 S.W. 776, 778 (Mo. 1893). The doctrine of substantial compliance excuses hypertechnical violations of statutory provisions. Id. "Substantial compliance can be defined by looking to the purpose of the statutory requirement itself." State ex rel. Le Fevre v. Stubbs, 642 S.W. 2d 103, 105 (Mo. 1982).

Here, the clear purpose of Section 486.350 is to ensure that individuals are not charged more than $2.00 for notarization. Security Title satisfied this requirement by charging Appellants $12.00 for notarizing ten signatures, which clearly amounts to less than $2.00 per signature.[2] Similarly, no one has challenged the genuineness of Appellants' notarized signatures, which were accepted by the lending institution through which Appellants' refinanced their home. In other words, the notarizations were effective and the purpose of the statute was not frustrated by the alleged failure to record. Such substantial compliance was recognized by the Eastern District Court of Appeals

[2] Similarly, there are no time limits in the Act for recording the fact of notarization in a notarial journal. Thus, even assuming that the entries in this case were not made at the time of the transaction, there is nothing preventing Security Title from recording the act at a later date. Had the Legislature intended that the failure to keep a journal qualify as "official misconduct," it would have established a bright line standard for the timing of the entry and thus for determining when the Notaries Public Act was violated.

below, which held that Appellants' argument "overlooks the purpose of a notary's service, which is to prove the authenticity of a signature." Security Title, 2007 WL 1814294 at *3 (citing Herrero v. Cummins Mid-America, Inc., 930 S.W. 2d 18, 21 (Mo. Ct. App. 1996)); see also Old Republic, 2007 WL 1814303, at * 3. Security Title thus substantially complied with the Act.

Indeed, Missouri courts have routinely refused to hold notaries liable where, as here, they substantially complied with notarization requirements. See, e.g., Sharpton v. Lofton, 721 S.W. 2d 770, 776 (Mo. Ct. App. 1986) (ruling that even if the notary "acted in an irregular manner" in notarizing plaintiffs' signatures outside plaintiffs' presence, the trial court correctly denied plaintiffs relief); Herrero, 930 S.W. 2d at 21-22 (refusing to hold notary liable under the Notaries Public Act for notarization outside the presence of a signatory); Means, 791 S.W. 2d at 435-436 (refusing to hold notary liable under the Notaries Public Act for notarization outside the presence of a signatory); see also Dickey v. Royal Banks of Missouri, 111 F. 3d 580, 584 (8th Cir. Mo. 1997) (finding that a notary could not be held liable under the Notaries Public Act even though notarization was "technically deficient").

In sum, the sections of the Notaries Public Act directly related to the keeping of a notary journal and the charging of fees do not classify failing to record notarized signatures or charging $2.00 or less per notarized signature without recording the fact of notarization as "official misconduct." Appellants provide no authority for their conclusion to the contrary. As a result, Appellants fail to meet the "official misconduct"

requirement of Section 486.355 and the Court should affirm summary judgment in Security Title's favor on Count I of Appellants' Petition.

2. Appellants have not and cannot show that they suffered "damages proximately caused" by Security Title.

Appellants' Notaries Public Act claim also fails because Appellants cannot, on the undisputed facts, establish that they incurred ***"damages proximately caused"*** by Security Title's alleged conduct. Accordingly, Security Title was properly granted summary judgment on Count I of Appellants' Petition.

Again, Section 486.355 makes a notary public "liable to the persons involved ***for all damages proximately caused*** by a notary's official misconduct." Mo. Rev. Stat. § 486.355 (emphasis added). Although there are no Missouri cases interpreting this specific provision in the context of liability for failure to record signatures in a notary journal, several Missouri courts have denied recovery when plaintiffs have failed to show that they were harmed by alleged errors made during the course of the notarization process. See, e.g., Herrero, 930 S.W. 2d 18 (denying recovery under Mo. Rev. Stat. § 486.360 when plaintiff failed to show that she was damaged as a result of notary's action in changing language on beneficiary designation form); Means, 791 S.W. 2d at 435-436 (denying recovery for notary's alleged "official misconduct" when notarization of fraudulent signature "could not have been the proximate cause" of plaintiffs' loss); Sharpton, 721 S.W. 2d at 776 (denying recovery when plaintiffs failed to show that they were damaged by notarization of signatures made outside notary's presence). See also New v. Corrough, 370 S.W. 2d 323, 326-327 (Mo. 1963) (affirming trial court's ruling

that a set of twenty-four absentee ballots were valid despite the failure of certain notary publics to designate in the notary certificate the expiration dates of their commissions).

Here, Appellants' claims suffer from the same fatal defects as the plaintiffs' claims that were rejected in those cases, for Appellants have not and cannot show on the undisputed record evidence that they were proximately damaged by Security Title's alleged failure to record signatures. While Appellants claim that their signatures should also have been recorded in a notary journal, Appellants fail to even allege, much less show, any damage proximately caused by that failure as required under Section 486.355.

Again, as noted by the Eastern District Court of Appeals below in affirming summary judgment in Security Title's favor, Appellants' argument "overlooks the purpose of a notary's service, which is to prove the authenticity of a signature." Security Title, 2007 WL 1814294 at *3 (citing Herrero, 930 S.W. 2d at 21); see also Old Republic, 2007 WL 1814303, at * 3. It is undisputed that Appellants received what they bargained for – notarized (*i.e.* authenticated) signatures that successfully served as prerequisites to refinancing their property. Because Appellants have no evidence that they were harmed by Security Title's purported failure to record the notarizations, the trial court properly granted summary judgment on Count I of Appellants' Petition.

C. The Court should disregard Appellants' citation to the "Document Certification Services" Handbook and "Missouri Notary Handbook" because they are improperly cited for the first time on appeal, have no precedential value, and shed no light on the meaning of Section 486.350 of the Notaries Public Act.

In their Substitute Brief, Appellants rely on a "Document Certification Services" Handbook produced by former Missouri Secretary of State Matt Blunt's Office and a "Missouri Notary Handbook" produced by current Missouri Secretary of State Robin Carnahan's Office (referred to herein as the "Handbooks") in arguing that both notarization and recording are prerequisites to collecting a $2.00 fee. (Appellants' Sub. Br. at 12-13, A-23-A-29.) Appellants' argument fails for three reasons.

First, as a threshold matter, the Handbooks should be disregarded by the Court because they are not part of the record below and were cited for the first time on appeal. Appellants cite the Missouri Notary Handbook for the first time before this Court and raised the Document Certification Services Handbook for the first time before the Eastern District Court of Appeals. Although a grant of a summary judgment can be affirmed on any ground whatsoever, "[a] party cannot raise an argument ***against*** a grant of summary judgment for the first time on appeal." Schwartz v. Custom Printing Co., 926 S.W. 2d 490, 493 (Mo. Ct. App. 1996) (emphasis added) (citing D.E. Properties v. Food For Less, 859 S.W. 2d 187, 201 (Mo. Ct. App. 1993); see also State v. Winfield, 5 S.W. 3d 505, 515 (Mo. 1999) (parties are "bound by the arguments made and issues raised at trial and may not raise new and totally different arguments on appeal."); Christeson v. State, 131 S.W. 3d 796, 800 n.7 (Mo. 2004) ("[C]laims not presented to the motion court cannot be raised for the first time on appeal."). As a result, Appellants' citation to and argument regarding the Handbooks should not be considered by the Court.

Second, the Handbooks should be disregarded by the Court because they in no way qualify as fact-specific opinions or decisions of an administrative agency made in

contested cases on full records or agency "rules" promulgated as the result of the exhaustive rulemaking procedures required by Missouri law, such that they would even be entitled to consideration. See Mo. Rev. Stat. 536.010(4)(defining a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing")[3]; Missouri State Div. of Family Services v. Barclay, 705 S.W. 2d 518 (Mo. Ct. App. 1985)(rejecting agency-authored manual as having "no controlling force" due to noncompliance with Missouri's

[3] Even if the Handbooks did qualify as agency decisions or opinions, they have ***no precedential value***, especially with respect to any legal conclusions drawn about the meaning of a statute like the Notaries Public Act. See, e.g., 20A Mo. Prac. § 12:41 (indicating that Missouri courts have consistently approached issues of statutory interpretation "with little or no deference to the agency conclusions"); see also State ex rel. 401 North Lindbergh Associates v. Ciarleglio, 807 S.W. 2d 100 (Mo. Ct. App. 1990)(administrative decisions have "no precedential value for appellate courts"); McKnight Place Extended Care, L.L.C. v. Mo. Health Facilities Review Comm'n, 142 S.W. 3d 228, 235 (Mo. Ct. App. 2004) (agency decisions are not binding precedent on the Missouri courts) (citing State ex rel. AG Processing, Inc. v. Public Serv. Comm'n, 120 S.W. 3d 732, 736 (Mo. banc 2003)).

rulemaking procedures); Couch v. Dir., Missouri State Div. of Family Services, 795 S.W. 2d 91 (Mo. Ct. App. 1990)(same).[4]

Third, Appellants' reliance on the Handbooks is misplaced because they shed little if any light on the meaning of Section 486.350(1). In this regard, Appellants point to language contained in the Handbooks that merely paraphrases what is contained in Section 486.350(1). (Appellants' Sub. Br. at 12-13.) Such paraphrasing does not offer additional insight into the meaning of the statute or definitively reveal the Secretary of State's interpretation of the statutory language. Indeed, if anything, it confirms the Court of Appeals' interpretation that a notary may not charge an additional fee for the separate notarial act of recording. While Appellants note that a portion of the language appearing in the Document Certification Services Handbook produced by former Secretary of State Matt Blunt's Office is capitalized, such capitalization does not appear in the more recent Missouri Notary Handbook produced by Secretary of State Robin Carnahan's Office. (See Appellants' Sub. Br. at A-23, A-29.) Thus, these documents do not, as Appellants

[4] In this regard, even assuming that the Handbooks' content qualifies as a "rule," the Court cannot accept Appellants' implicit invitation to take judicial notice of the Handbooks, as they are not published in the Code of State Regulations. See Powell v. State Farm Mut. Ins. Automobile Co., 173 S.W. 3d 685, 689-90 (Mo. Ct. App. 2005) ("Unless a rule or regulation has been published in the Code of State Regulations … a court may not take judicial notice of an administrative rule or regulation.").

argue, evince an endorsement of Appellants' interpretation of the Notaries Public Act "by whomever has been elected Secretary of State." (Appellants' Sub. Br. at 13.)

III. The Court should disregard Appellants' argument related to Section 486.350(3) of the Notaries Public Act (Mo. Rev. Stat. § 486.350(3)) because that argument is improperly raised for the first time on appeal. (Response to Appellants' Point Relied on I.)

In their Substitute Brief, Appellants alternatively argue that summary judgment on Count I of their Petition should be reversed because, at most, Security Title was permitted to charge Appellants $1.00 per notarized signature under Mo. Rev. Stat. § 486.350(3). (Appellants' Sub. Br. at 11-14.) Security Title objects to this argument, as well as Appellants' alternative argument that Security Title is entitled to no compensation at all under Section 486.350(3), on the ground that they are raised for the first time on appeal. The Court should not countenance Appellants' impermissible attempt to belatedly slip additional arguments into the record below in an effort to avoid the well-established rule that they cannot raise new arguments before this Court.

Once again, although a grant of a summary judgment can be affirmed on any ground whatsoever, "[a] party cannot raise an argument ***against*** a grant of summary judgment for the first time on appeal." Schwartz, 926 S.W. 2d at 493; see also State v. Winfield, 5 S.W. 3d at 515; Christeson, 131 S.W. 3d at 800 n.7.

Even a cursory review of the Legal File submitted by Appellants reveals that they did not ask the trial court to consider the impact of Section 486.350(3) on their claims

during the briefing of Security Title's Motion for Summary Judgment or the hearing thereon. Instead, Appellants chose to raise this issue for the first time some five days before filing their Notice of Appeal by slipping a short motion into the file. (See L.F. at 115-117.) This motion was filed well after the trial court granted summary judgment, and was neither briefed nor argued before the trial court. There is no indication in the record, moreover, that the trial court was even aware of Appellants' motion. This is not surprising, since Appellants never even requested a hearing on that belated motion. As a result, Appellants' Section 486.350(3) arguments should be disregarded as not properly before the Court.

However, even if this Court were somehow inclined to entertain Appellants' Section 486.350(3) arguments, these arguments provide absolutely no basis for reversal of the trial court. Appellants' argument is that by failing to record signatures in the notary journal, the "notarial act" is "incomplete" pursuant to Section 486.350(1), and, therefore, at most, Section 486.350(3), which establishes a $1.00 maximum fee for "any other notarial act performed," applies to the transaction at issue. (Appellants' Sub. Br. at 13.) Appellants go on to argue that Security Title is not entitled to charge anything for its "incomplete" act under Section 486.350(3), because "[p]erforming an incomplete act, like Security Title in this case, is not the type of act that subsection three contemplates." (Appellants' Sub. Br. 13-14.)

Appellants' tortured reading of the Act ignores the plain meaning of Section 486.350(1). As discussed above in Section II of this Substitute Brief, rather than establishing the prerequisites for a "notarial act," sub-section (1) merely clarifies that a

maximum fee of $2.00 may be charged for any notarization, and that notaries may not charge an additional fee for entry into in the notary journal. Absent that clarification, notaries could charge $2.00 for a notarization, and an additional $1.00 under subsection (3) for the entry into the notary journal, which would constitute a "notarial act." See Security Title, 2007 WL 1814294, at * 3 (noting that Section 486.350 "serves to prohibit a notary from charging an additional fee for recording the notarial act in a journal" rather than as a "prerequisite to charging the $2 fee"); see also Old Republic, 2007 WL 1814303, at * 3.

Clearly, this case involves not "other notarial acts performed" by Security Title, but the notarization of signatures, which the Act specifically addresses. The maximum fees for notarization of signatures is established by Section 486.350, subsection (1), and not subsection (3). Therefore, even if the Court were to somehow consider Appellants' belated argument regarding Section 486.350(3), reversal of the trial court's ruling is unwarranted.

IV. The Court should affirm summary judgment in Security Title's favor on Appellants' common law unjust enrichment claim (Count II of Appellants' Petition) because (A) Appellants' common law claim is preempted by the Notaries Public Act; and (B) Security Title was not "unjustly enriched" in charging Appellants $12.00 for notarizing ten signatures. (Response to Appellants' Point Relied on II.)

Appellants' common law unjust enrichment claim is unsustainable for two reasons. First, Appellants' claim is predicated entirely on the notion that Security Title overcharged Appellants for notarizing documents because Security Title allegedly failed to record said notarization in a notary journal. The point of reference for this claim is Section 486.350 of the Notaries Public Act and the dollar amounts and duties delineated therein. As demonstrated below, the Notaries Public Act created new rights or liabilities that did not exist at common law with respect to the charging of fees for notarizing signatures and/or recording such notarization in a notarial journal. Moreover, the Notaries Public Act provides specific remedies for the enforcement of its provisions. As a result, Appellants' unjust enrichment claim is preempted by the Notaries Public Act.

Second, even if Appellants' claim is not preempted by the Notaries Public Act, Appellants have not and cannot show that Security Title was unjustly enriched by Appellants' $12.00 payment. Simply put, Appellants received exactly what they bargained for – notarized signatures – at a reasonable price, such that Security Title could not have been unjustly enriched as a matter of law. Moreover, because Appellant's unjust enrichment claim is derivative of Appellants' claim under the Act, it necessarily fails for the same reasons Count I fails. Therefore, the trial court properly granted Security Title summary judgment on Appellants' unjust enrichment claim because Appellants failed to state a claim as a matter of law.

A. Appellants' common law unjust enrichment claim is preempted by the Notaries Public Act because the Act creates "a new right or liability that did not exist at common law" with respect to the charging of fees

for notarization and/or recording notarization in a notary journal, and provides "a specific remedy for the enforcement thereof."

Under Missouri law, it is well-established that when a statute creates "a new right or liability that did not exist at common law" and provides "a specific remedy for the enforcement thereof," the statutory remedy is ***exclusive***. Gales v. Weldon, 282 S.W. 2d 522, 529 (Mo. 1955); Von Ruecker v. Holiday Inns, Inc., 775 S.W. 2d 295, 299 (Mo. Ct. App. 1989); State ex rel. Slibowski v. Hon. William H. Kimberlin, 504 S.W. 2d 237, 240 (Mo. Ct. App. 1973).

For example, in Von Ruecker, the plaintiff, a bar patron, sued the defendant hotel after he suffered injuries in an alcohol-related automobile accident. Id. at 296. The plaintiff alleged that he was served alcohol by the hotel when he was under the age of twenty-one and obviously intoxicated. Id. The court affirmed the trial court's dismissal of plaintiff's common law negligence, intentional tort, strict products liability, negligent products liability, and breach of contract claims on the ground that such claims were preempted by Mo. Rev. Stat. § 537.053. Section 537.053 provided that a cause of action could be brought "by or on behalf of any person who suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises" when the licensed person

> pursuant to section 311.310 RSMo, had been convicted or had received a suspended imposition of the sentence arising from the conviction of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously

intoxicated person if the sale of such intoxicating liquor was the proximate cause of the personal injury or death sustained by such person.

Id. at 297-298. The court held that because Section 537.053 "created a limited cause of action where none previously existed," the statutory remedy provided by Section 537.053 was "exclusive[.]" Since the plaintiff was unable to state a cause of action under the statute, the Court dismissed his action in its entirety. Id. at 299.

Here, as in Von Rueker, Appellants are limited to seeking recovery pursuant to Section 486.350 because that section provides "a new right or liability that did not exist at common law" and "a specific remedy for the enforcement thereof." Appellants have not shown and cannot show that Security Title had an independent common law duty to charge a maximum of $2.00 per notarized signature ***and*** (indulging Appellants' theory) recording items in a notary journal. Even if Appellants' interpretation of the statute were correct, that fee limitation is solely a creature of the Notaries Public Act, which creates a private remedy for "damages" "proximately caused" by alleged violations of its provisions, provided that such violations rise to the level of "official misconduct." Mo. Rev. Stat. § 486.355. As detailed above in Section II.B of this Substitute Brief, Security Title's alleged failure to record neither "proximately caused" Appellants "damages," nor constituted "official misconduct" under the Notaries Public Act. As a result, they are neither entitled to recovery pursuant to the Notaries Public Act, nor their common law unjust enrichment theory.

In their Substitute Brief, Appellants try to prop up their unjust enrichment claim by arguing that notaries had general "liability" at common law. (Appellants' Sub. Br. at

16.) This argument misses the mark. After all, the question is not whether notaries had ***any*** common law duties whatsoever, but whether they had any particularized duty independent of the Notaries Public Act to charge only $2.00 for notarization ***and*** recording (again, indulging Appellants' erroneous interpretation). Appellants cite absolutely no authority that supports such a particularized, dollar-specific duty at common law. Nor do Appellants cite authority for a common law duty to log notarized signatures in a notary journal. Consequently, the Notaries Public Act creates a new right or liability that did not exist at common law and, for this reason alone, Appellants' unjust enrichment claim is preempted and fails as a matter of law.

The case law on which Appellants rely cannot alter this unassailable conclusion. Although State ex. rel. Workingmen's Banking Co. v. Edmunds, 66 Mo. App. 47, 51 (Mo. Ct. App. 1896), discussed a notary's common law liability, it is distinguishable because it did so only in the negotiable paper context. In Edmunds, the plaintiff brought suit against a notary for allegedly giving improper notice of a note's dishonor. In finding for the notary, the court held that neither the negotiable paper statute at issue nor the statutes defining the general powers and duties of notaries public added anything to a notary's responsibilities at common law in giving notice of a note's dishonor. Id. at 51. In other words, the plaintiff was suing for breach of a duty imposed by common law, not one created solely by statute. The Edmunds court did not find, as Appellants suggest, that notaries may be held liable for ***all*** alleged misconduct at common law, much less misconduct for duties newly created and governed by Missouri's general notary public statutes.

The non-binding foreign authorities cited by Appellants also fail to save their legally defective unjust enrichment claim. Indeed, none of those foreign cases holds that a defendant could be held liable at common law for charging in excess of a statutorily-imposed amount for notary services. Rather, each of those decisions simply holds that notaries had a common law duty of care, such that the notaries were held liable pursuant to common law negligence theories rather than unjust enrichment theories. As Appellants do not allege that Security Title was negligent, such cases have no application here. See In re Thigpen v. Matrix Financial Services, No. 02-14280MAM13, 2004 Bankr. LEXIS 1135, at *5 (Bankr. S.D. Ala. May 25, 2004) (notary sued for failure to properly witness signature); First Bank of Childerburg v. Florey, 676 So. 2d 324, 331 (Ala. Civ. App. 1996) (notary sued for notarizing fraudulent signature); Independence Leasing v. Aquino, 445 N.Y.S.2d 893, 894 (N.Y. Civ. Ct. 1981) (notary sued for notarizing signature made outside notary's presence); Figures v. Fly, 193 S.W. 117, 120 (Tenn. 1916) (notary sued for notarizing fraudulent signature); Clapp v. Miller, 156 P. 210, 211 (Okla. 1916) (notary sued for execution of false certificate).

In sum, Appellants have not and cannot show that such an overcharge action is or has ever been available to them at common law. Instead, Plaintiffs' claim is governed exclusively by the Notaries Public Act. Because Appellants have no claim under the Act, they have no claim – period. As a result, Appellants' unjust enrichment claim (Count II) is preempted as a matter of law, and the Court should affirm summary judgment on Count II in Security Title's favor for the same reasons it should affirm summary judgment on Count I.

B. Security Title was not "unjustly enriched" because Appellants received a benefit from Security Title (the notarization of ten signatures) in exchange for a reasonable fee ($12.00).

Even assuming *arguendo* that Appellants' common law unjust enrichment claim is not preempted by the Notaries Public Act, it still fails as a matter of law. Appellants cannot establish an essential element of their unjust enrichment claim because it is Appellants, not Security Title, that stand to be unjustly enriched if permitted to recover pursuant to Count II of their Petition.[5]

Under Missouri law, "[u]njust enrichment occurs when a benefit is conferred upon a person in circumstances in which retention by him of that benefit without paying its reasonable value would be unjust." Lincoln County Ambulance Dist. v. Pacific Employers Ins. Co., 15 S.W. 3d 739, 744 (Mo. Ct. App. 1998); see also Am. Standard Ins. Co. of Wis. v. Bracht, 103 S.W. 3d 281, 291 (Mo. Ct. App. 2003). The "most important requirement is that the enrichment be 'unjust.'" JB Contracting, Inc. v. Bierman, 147 S.W. 3d 814, 819 (Mo. Ct. App. 2004).

[5] Security Title raised this in its Motion for Summary Judgment before the trial court. Appellants failed to respond to this argument either at the trial court level or on appeal. As a result, Appellants have implicitly conceded that they, rather than Security Title, would be unjustly enriched if they were allowed to retain the benefit of Security Title's services without payment.

It is undisputed that Appellants were charged $12.00 for notarizing ten signatures. Because Security Title was entitled to collect up to $20.00 for the services it provided Appellants under Missouri law, the $12.00 fee incurred by Appellants was more than reasonable, and certainly not unjust. By contrast, permitting Appellants to recover notary fees from Security Title would unjustly enrich Appellants. Despite Security Title's alleged failure to record Appellants' signatures in a notarial journal, Appellants clearly received something of value for their money: the notarization needed to proceed with refinancing their real estate. Simply put, Security Title conferred a benefit on Appellants, the receipt of which would be unjust without payment. Thus, the trial court properly granted Security Title summary judgment on Count II of Appellants' Petition.

V. The Court should affirm summary judgment in Security Title's favor on Appellants' Missouri Merchandising Practices Act ("MMPA") claim (Count III of Appellants' Petition) because (A) the MMPA does not apply to insurance agencies like Security Title; (B) Appellants' MMPA claim is preempted by the Notaries Public Act; and (C) Appellants suffered no "ascertainable loss" in paying $12.00 for the notarization of ten signatures. (Response to Appellants' Point Relied on III.)

The trial court properly granted Security Title summary judgment on Count III of Appellant's Petition because, as a matter of law, Appellants are, as demonstrated below, without evidence sufficient to establish an MMPA claim.

A. The MMPA does not apply to insurance agencies like Security Title.

Appellants' MMPA claim fails as a matter of law because, by its own terms, the MMPA does not apply to insurance agencies such as Security Title. Appellants brought suit pursuant to Section 407.025 of the MMPA (Mo. Rev. Stat. § 407.025), which provides for a private right of action arising from practices "declared unlawful by section 407.020" of the MMPA. In turn, Mo. Rev. Stat. § 407.020 bars recovery from institutions or companies "under the direction or supervision of the director of the department of insurance…" Mo. Rev. Stat. § 407.020.2(2).

As an insurance agency, Security Title operates under the direction or supervision of the director of the department of insurance. (See L.F. 111 –113.) Accordingly, the trial court properly granted Security Title summary judgment on Count III of Appellants' Petition.

B. Appellants' MMPA Claim is preempted by the Notaries Public Act.

In their Substitute Brief, Appellants argue that the Notaries Public Act does not preempt the MMPA because the statutes "complement each other and can be used together." (Appellants' Sub. Br. at 20.) Appellants are wrong. Even if Missouri law required that the two statutes conflict (which it does not), the more specific Notaries Public Act and the more general MMPA ***are repugnant and cannot be harmonized***. Thus, the MMPA is preempted and cannot, as a matter law, form a basis for liability in this case.

Appellants contend that because the MMPA includes a provision stating that it presents no bar to other civil actions and the Notaries Public Act contains no explicit language indicating that it provides the exclusive remedy for claims against notaries, the

statutes do not conflict. (Appellants' Sub. Br. at 20.) Appellants' contention misconstrues the applicable law.

Appellants cite no authority for the proposition that a specific statute like the Notaries Public Act must explicitly preempt a general statute like the MMPA. In fact, the rule is that, regardless of any express preemption provision in the statute itself, a "specific statute prevails over a general one." See, e.g., Dismuke v. City of Sikeston, 614 S.W.2d 765, 766 (Mo. Ct. App. 1981) (general statutory provision making city manager "the administrative head of government" did not apply to change specific statutory requirement that lawsuits be served upon the mayor); State ex rel. Fort Zumwalt School Dist. v. Dickherber, 576 S.W. 2d 532, 536 (Mo. banc 1979) (specific statute which directed interest on school funds to be credited to the schools prevailed over general statute mandating that all money, including interest, collected by county should go to the general revenue fund). If Appellants were correct and an affirmative statement regarding preemption were required, both Dismuke and Dickherber would have been decided differently.

Moreover, Appellants' argument that Dover v. Stanley, 652 S.W. 2d 258 (Mo. Ct. App. 1983), does not apply to the current suit because there is no repugnancy between the MMPA and the Missouri Notaries Public Act is without merit. (Appellants' Sub. Br. at 21.) In Dover, a buyer of a used automobile filed an action against a dealer and a former owner alleging an inaccurate odometer statement. Dover, 652 S.W. 2d at 259 –261. The buyer attempted to assert claims under both the MMPA and Mo. Rev. Stat. § 407.535

(the Missouri Odometer Disclosure Statute or "MODS").[6] Id. at 259. The court rejected this assertion, noting that the buyer was limited to recovery under Section 407.535 of the MODS (the more specific statute) rather than ***both*** Section 407.535 and Section 407.025 of the more general MMPA. Id. at 264.

The Dover court did not state, as Appellants would have this Court believe, that its holding was predicated on some notion the court was "reviewing two portions of the same statute enacted at the same time." (Appellants' Sub. Br. at 20.) Instead, the court concluded that, in enacting the MODS, the General Assembly "intended that claims giving rise to the recovery of damages and the limits of recovery for unlawful practices stemming from or based upon motor vehicle odometers are limited to and must be pursued in conformity with" the MODS "and not upon the general provisions of" the MMPA. Dover, 652 S.W. 2d at 264. In other words, the more specific statute (the MODS) was found to trump the more general one (the MMPA).

In addition, Dover does not ***require*** a repugnancy between statutes in order to apply a more specific statute over a general one. The Dover court itself stated that a "cardinal rule is that where a specific statute and a general statue dealing with the same subject exist, the specific statute prevails over the general statute." Id. at 263. In any event, even if Dover were somehow read to require a conflict between statutes, the

[6] Mo. Rev. Stat. § 407.535 was repealed by L.1977, S.B. No. 180, § 1. Its provisions now can be found in Mo. Rev. Stat. § 407.536.

statutory scheme of the MMPA squarely conflicts with and thus is repugnant to the Notaries Public Act in this case.

Clearly, if there is no liability for acts under the specific provisions of the Notaries Public Act, any reading of the general provisions of the MMPA to create such liability would represent "discord" between the statutes. Moreover, the MMPA, in sharp contrast to the Notaries Public Act, provides for criminal penalties and civil penalties of not more than $1,000.00 per violation, as well as unique civil penalties for violating injunctions or restitution orders. Mo. Rev. Stat. §§ 407.020.3, 407.100.6, 407.110. The MMPA, unlike the Notaries Public Act, further vests the Attorney General with the power to issue civil investigative demands, appoint temporary receivers, and sequester funds. Mo. Rev. Stat. §§ 407.040, 407.100.1. Also, the MMPA, again unlike the Notaries Public Act, allows a prevailing party in a private action to recover punitive damages and its attorney's fees. Mo. Rev. Stat. § 407.025.1. If the Legislature had intended such penalties, powers, and remedies to be available under the Notaries Public Act, it would have expressly created them within the Notaries Public Act itself. Because it expands the Notaries Public Act's penalties and remedies, the MMPA impermissibly conflicts with and is thus repugnant to that more specific statute. Consequently, recovery under the MMPA is preempted by the Notaries Public Act.

Ultimately, Appellants are impermissibly attempting to use the general provisions of the MMPA to completely rewrite the statutory scheme of the Notaries Public Act that specifically governs the conduct of notaries public. Missouri's preemption rules exist precisely to prevent such misuses of generalized statutes. Appellants' claim that Security

Title charged too much for notary services is limited to, and must be pursued in conformity with, the more specific provisions of the Notaries Public Act, which preempts the more general provisions of the MMPA. Moreover, as with Appellants' unjust enrichment claim, Appellants' MMPA claim is derivative of their claim under the Notaries Public Act, such that if that MMPA claim is not preempted, it fails for the same reasons that Count I fails. As a result, the trial court properly granted Security Title summary judgment on Count III of Appellants' Petition.[7]

C. Appellants' MMPA Claim fails as a matter of law because Appellants suffered no "ascertainable loss."

[7] Appellants' reliance on State ex rel. Webster v. Myers, 779 S.W. 2d 286, 287-288 (Mo. Ct. App. 1989), is also misplaced. (Appellants' Sub. Br. at 21 n.3.) Webster does not state that the Legislature "overturned" Dover. (Id.) Instead, Webster makes the point that, after Dover, the Legislature repealed Section 407.550 of the MODS and replaced it with Section 407.551. The Webster court found that, ***due to this replacement***, the holding in Dover was inapplicable ***in that case***. Id. at 288. In turn, Webster is inapplicable to the current action because both sections discussed in Webster addressed the Legislature's revision of remedies available to the ***Missouri Attorney General*** under the MODS, whereas Dover, a case between private litigants, discussed the interplay between two conflicting ***private remedies*** provided for in statutory sections different from that discussed in Webster.

A prerequisite to any action under the MMPA is that the plaintiff suffer an "ascertainable loss." Mo. Rev. Stat. § 407.025. Missouri courts have noted that the MMPA is "plain and unambiguous" in that it only provides a private cause of action to one who "purchases and ***suffers damage***." Ziglin v. Players MH, L.P., 36 S.W. 3d 786, 790 (Mo. Ct. App. 2001) (emphasis added); see also Jackson v. Charlie's Chevrolet, Inc., 664 S.W. 2d 675, 677 (Mo. Ct. App. 1984).

Appellants did not suffer an "ascertainable loss" in paying $12.00 for the notary services they received. Under Missouri law, it is only upon the payment in excess of the reasonable value of the services received that an individual suffers a "loss." See, e.g., Lester E. Cox Med. Ctrs., Springfield, MO v. Huntsman, 2003 WL 22004998, at *3 (W.D. Mo. 2003) (requiring payment in excess of the reasonable value of services to establish "ascertainable loss"); Freeman Health Sys. v. Wass, 124 S.W. 3d 504, 407 (Mo. Ct. App. 2004) (where appellant paid nothing for the medical goods and services provided by the hospital, "it is difficult to discern that he had an ascertainable loss.") Here, Security Title's notary services were reasonably valued at $12.00 for ten signatures. In fact, under Missouri law, Security Title was able to charge up to $20.00 for the same services. It is therefore clear that Appellants have suffered no ascertainable loss as required under the MMPA. Accordingly, the trial court properly granted Security Title summary judgment on Count III of Appellants' Petition.

CONCLUSION

Accordingly, for the foregoing reasons and authorities, the trial court did not err in granting Security Title summary judgment on all three Counts of Appellants' Petition.

Dated: November 20, 2007

Respectfully Submitted,

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MISSOURI SUPREME COURT

LISA L. ROKUSEK, JENNIFER HUMAN, Appellants, v. SECURITY TITLE INSURANCE CO., L.L.C., SECURITY TITLE INSURANCE AGENCY, L.L.C., Respondents.	)	Appeal No.: SC 88762

ATTORNEYS' CERTIFICATE AND CERTIFICATE OF SERVICE

Pursuant to Rules 84.06(c) and 84.06(g), the undersigned certifies:

1. The Substitute Brief filed on November 21, 2007, on behalf of Respondents Security Title Insurance Company, L.L.C. and Security Title Insurance Agency, L.L.C. ("Respondents' Substitute Brief") complies with the requirements of Rule 55.03;

2. Respondents' Substitute Brief complies with the limitations contained in Rule 84.06(b);

3. Respondents' Substitute Brief contains 10,843 words, excluding this Attorney's Certificate (Rule 84.60(c)) and Certificate of Service, the cover, the signature block, and the Appendix, all of which are permitted to be excluded from the word count;

4. Electronic copies of Respondents' Substitute Brief, in Microsoft Word format, are on the enclosed floppy disk, and both the disk and the files have been scanned for viruses and are virus-free in compliance with Rule 84.06(g);

5. Two copies of Respondents' Substitute Brief and Appendix, a copy of this Certificate, and a duplicate of the floppy disk filed with the Court, were served on the following named counsel of record for Appellants at the following address on November 20, 2007, via Federal Express:

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APPENDIX –TABLE OF CONTENTS

NOTE: Judgment and Revised Statutes of Missouri, Chapter 486 already on file with the Court. See Appellants' Substitute Brief, Appendix, A-3 – A-17