

MISSOURI SUPREME COURT

Appeal No. SC 88763

LISA L. ROKUSEK, JENNIFER HUMAN,

Appellants,

v.

COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Respondent.

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellants brought their class action suit against Respondent by filing a three count petition arising out of the same facts. Count I alleged that Commonwealth's employee violated the notary public statute, Count II requested relief for unjust enrichment, and Count III asserted a cause of action against Commonwealth Land Title Insurance Company for violations under the Missouri Merchandising Practices Act.

The Petition alleged that Plaintiffs signed only two documents at the closing of the refinancing of 216 Haven Street. (L.F. 6). Defendant Commonwealth filed its Motion to Dismiss on May 17, 2006, and later supplemented its Motion to Dismiss on August 22, 2006 by providing Appellants (and filing with the trial court), an Affidavit and a complete copy of the closing files revealing that Appellant had omitted an additional notarized document from its allegations. (L.F. 17).

The court heard Respondent's Motion to Dismiss on August 23, 2006. (L.F. 107). The trial court granted the motion as to Count III for failure to state a cause of action. The court denied the Motion to Dismiss as to Counts I and II but, because the issues had been narrowed by the arguments at the hearing, Respondents immediately filed a Motion for Summary Judgment. (L.F. 112). After Respondent's documents had been produced to Appellant, the court entered an order partially staying further discovery on the broader, class issues. (L.F. 107).

Respondent filed its Motion for Summary Judgment immediately thereafter and all material aspects of the statement of uncontroverted material facts were admitted by Appellants. (L.F. 115; L.F. 151).

At summary judgment, Appellants admitted that documents were signed which required a total of six (6) notarizations. (L.F. 103). The documents were signed by each plaintiff and then each signature was notarized. (L.F. 103). Appellants were charged \$2.00 each or \$12.00 for the six notarized signatures. (L.F. 103). Defendant admitted that the signatures of each Plaintiff on the closing documents were genuine (L.F. 151); that a total of six notarized signatures appeared on the documents (L.F. 151); and that the signatures were notarized by an employee of Respondent (L.F. 151).

The trial judge entered its judgment on November 8, 2006 finding that Respondent did not charge a notary fee higher than the statutory maximum allowed under §486.350 RSMo. and that Respondent could not be unjustly enriched thereby. (L.F. 153). Appellant thereafter filed its Notice of Appeal and this appeal followed. (L.F. 161). Appellant's Motion to Vacate the Judgment was filed eight days later. (L.F. 155).

Notably, Appellants alleged only that Commonwealth should not have charged "*any*" fee (L.F. 7; paragraph 15 Petition). Appellant did not allege in any count in the court below that the charging of a \$1.00 fee was an appropriate charge. (L.F. 5, Plaintiff's Petition).

Appellant's Table of Contents and Legal File are not in chronological order in that the Motion to Vacate Summary Judgment, which does not bear a filing date, is found immediately after the judgment in the legal file and before the Notice of Appeal. However,

Plaintiff's Motion to Vacate Judgment was filed on November 28, 2006, eight days after it filed its Notice of Appeal on November 20, 2006.

POINTS RELIED ON

I. APPELLANTS' FIRST POINT ON APPEAL SHOULD BE DENIED AND SUMMARY JUDGMENT AS TO COUNT I OF APPELLANT'S PETITION SHOULD BE AFFIRMED BECAUSE NEITHER RESPONDENT NOR ITS EMPLOYEE CAN BE SUBJECT TO LIABILITY UNDER THE NOTARY PUBLIC ACT FOR PROPERLY NOTARIZING A GENUINE SIGNATURE AND CHARGING THE MAXIMUM FEE ALLOWED BY STATUTE, EVEN UNDER CIRCUMSTANCES WHEREIN THE NOTARY PUBLIC DOES NOT RECORD THE ACT IN A JOURNAL, IN THAT APPELLANTS CANNOT DEMONSTRATE THAT THE NOTARY COMMITTED "OFFICIAL MISCONDUCT".

Herrero v. Cummins, Mid-America, Inc., 930 S.W.2d 18, 22 (Mo. Ct. App. 1996)

Dickey v. Royal Banks of Missouri, 111 F.3rd 580, 584 (C.A.8 (Mo.), 1997)

Kirk Corporation v. First American Title Co., 220 Cal. App. 3d 785 (1990)

Community Bancshares, Inc. v. Secretary of State, 43 S.W.3rd 821 (Mo. 2001)

II. APPELLANTS' SECOND POINT ON APPEAL SHOULD BE DENIED AND THE JUDGMENT OF THE TRIAL COURT AFFIRMED BECAUSE APPELLANTS' COMMON LAW UNJUST ENRICHMENT CLAIM IS PREEMPTED BY THE NOTARY PUBLIC ACT AND RESPONDENT WAS NOT UNJUSTLY ENRICHED BY RECEIVING A FEE FOR NOTARIZATION WHICH IT WAS LEGALLY ENTITLED TO CHARGE.

Gales v. Weldon, 282 S.W.2d 522, 529 (Mo. 1955)

Associate Engineering Co. v. Webbe, 795 S.W.2d 606, 608 (Mo. App. E.D.

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III. APPELLANTS' THIRD POINT ON APPEAL SHOULD BE DENIED AND THE DISMISSAL OF COUNT III SHOULD BE AFFIRMED BECAUSE MISSOURI'S MERCHANDISING PRACTICES ACT DOES NOT APPLY TO RESPONDENT IN THAT IT IS A COMPANY UNDER THE DIRECTION AND SUPERVISION OF THE DIRECTOR OF THE DEPARTMENT OF INSURANCE AND THIS COURT, AS THE TRIAL COURT PROPERLY DID, CAN TAKE JUDICIAL NOTICE OF THAT FACT.

Newson v. City of Kansas City, 606 S.W.2d 487 (Mo. App. W.D. 1980)

Endicott v. St. Regis, 443 S.W.2d 122 (Mo. 1969).

§407.020.2(2) RSMo.

IV. THE JUDGMENT OF THE TRIAL COURT MUST BE AFFIRMED AND CERTAIN ARGUMENTS AND MATERIALS SUBMITTED BY APPELLANTS SHOULD BE STRICKEN FROM THE RECORD BECAUSE APPELLANTS HAVE INAPPROPRIATELY ASSERTED FOR THE FIRST TIME ON APPEAL AN ARGUMENT NOT RAISED BEFORE THE TRIAL JUDGE AND HAVE INSERTED IN THE APPENDIX AN EXHIBIT NOT ADMITTED BEFORE THE TRIAL COURT.

Brock v. Steward, 519 S.W.2d, 367 (Mo.Ct.App., 1975)

Denny's Inc. et al. v. Avesta Enterprises, Ltd., et al., 884 S.W.2d 281, 289 (fn. 5) (Mo.App. W.D., 1994)

Schwartz v. Custom Printing Co., 926 S.W.2d 490, 493 (Mo.App., 1996)

State v. Strong, 142 S.W.2d 702 (Mo. 2004)

Rule 84.04(h)

ARGUMENT

I. Appellants' First Point on Appeal should be denied and summary judgment as to Count I of Appellant's Petition should be affirmed because neither Respondent nor its employee can be subject to liability under the Notary Public Act for properly notarizing a genuine signature and charging the maximum fee allowed by statute, even under circumstances wherein the notary public does not record the act in a journal, in that Appellants cannot demonstrate that the Notary committed "official misconduct".

Respondent agrees with Appellant that the standard of review for the trial court's grant of summary judgment is *de novo*.

This is a class action lawsuit filed by Appellants and their counsel to recover an award from an insurance company. Appellant filed suit against Respondent (and in companion cases, other title insurers) alleging that Respondent overcharged Appellants for notarial services and in so doing committed "official misconduct" which proximately caused Appellants damages. The trial court granted summary judgment because it was undisputed that the six genuine signatures were notarized by Respondent's employee and Respondent charged Appellants \$12.00 - \$2.00 each for six notarizations.

The simplicity of Appellant's case cannot be overstated. Appellant's argument, simply put is that Respondent Commonwealth Land Title Insurance Company should be held liable because its employee notarized the genuine signatures of Appellants and charged the permitted maximum fee for the service rendered. Appellants did not sue the individual

notary public or her bonding company but rather the employer of the notary public. Appellant did not demonstrate before the trial court that the notary engaged in official misconduct or that Respondent, as the employer of the notary, consented to the notary public's official misconduct. Both elements are required by §486.360 RSMo. before an *employer* can be held liable.

The Appellants admitted that the signatures notarized were genuine and authentic. As such, the conduct of the notary cannot be “official misconduct” under the Notary Public Act. Because the notary did not commit official misconduct, both the notary and her employer are removed from liability. The only consideration for the trial court was whether the notary charged in excess of the maximum fee allowed by the statute for notarizing the genuine signature. However, Appellant admitted that the fee of \$2.00 was charged which is the maximum fee allowed by statute. Thus, Respondent could not as a matter of law be liable to Appellants for damages amounting to “excessive charges”. Nevertheless, Appellant weaves an argument that the failure of the notary to record the six notarizations in a journal means that the notary could not charge a fee or that the fee of \$2.00, although permitted under the statute, is excessive.

Appellants do not cite one case – not a single case from any state – supporting a cause of action against a notary public or her employer for failing to keep a journal of notarial acts. As class action Plaintiffs, Appellants seek damages equal to the \$12.00 aggregate fee they expended for the notary services they received. However, there can be no civil liability imposed against a notary or his employer under the circumstances of this case.

A. Appellants cannot state a cause of action.

As the employer for the notary public who handled the closing and notarized the signatures of Appellants on the documents at issue, Respondents' liability is guided §486.360 RSMo. which provides:

“The employer of a notary public is also liable to the persons involved for all damages proximately caused by the notary's official misconduct if:

- (1) The notary public was acting within the scope of his employment at the time he engaged in the official misconduct; and
- (2) The employer consented to the notary public's official misconduct.” (emphasis added).

At Appellants closing of the refinancing at Commonwealth Land Title Insurance Company, the notarized signatures of each Appellant was required on three documents. (L.F. 17-19).

- A. Deed of Trust (L.F. 87);
- B. Survey Affidavit (L.F. 95); and
- C. Title Affidavit (L.F. 96).

It was admitted by Appellants that the signatures of each plaintiff on the closing documents described above were genuine. (L.F. 115; L.F. 151). Because the signatures notarized were authentic, neither the notary public nor her employer could have committed “official misconduct” under the Notary Public Act.

The admission by Appellant that the signatures are genuine “removes the notary from any responsibility for the execution of the assignment and the harm” . . . “because the notary’s duty is merely to acknowledge the authenticity of the signature.” *Dickey v. Royal Banks of Missouri*, 111 F.3rd 580, 584 (C.A.8 (Mo.), 1997). Citing *Herrero v. Cummins, Mid-America, Inc.*, 930 S.W.2d 18, 22 (Mo. Ct. App. 1996). The *Dickey* court stated that “because the plaintiff here did not dispute the genuineness of her signature, the defendant did not commit official misconduct, which would subject her to liability for notarizing the form outside of the plaintiff’s presence”. *Dickey* at 584; *Herrero* at 22. The Eighth Circuit, in *Dickey*, reversed the awarded relief which found against the employer for damages. See *Dickey* at 584.

In *Herrero v. Cummins Mid-America, Inc.*, 930 S.W.2d 18 (Mo. App. W.D. 1996), the Western District reviewed a case brought by a surviving spouse who contended that the notary committed official misconduct when she acknowledged that the husband of the plaintiff did not sign the document in the presence of a notary. The surviving spouse challenged the validity of the form on the ground that the document was executed outside the presence of a notary. However, the spouse admitted that the signature appearing on the document was genuine. The court in *Herrero* held that the rationale for notarization is to avoid the risk that the signature will not be authentic. Citing *Butler v. Encyclopedia Britanica, Inc.*, 843 F.Supp. 387, 396 (N.D. IL. 1994). See *Herrero* at 22. The *Herrero* opinion held that purpose of the notary’s service is to prove the authenticity of the signature. *Herrero* at 21. The Appellate Court upheld a summary judgment against the surviving

spouse and held that “Plaintiff cannot now claim that she was defrauded *or damaged* by Lockhardt’s failure to notarize the form in her presence. *Even if the notary acted in an irregular manner*, the evidence supported a finding that the acts were authorized.” *Herrero* at 22. [emphasis added].

Other Missouri cases have squarely addressed causation under the Notary Public Act. In *Yerkes v. Asberry*, 938 S.W.2d 307 (Mo. App. E.D. 1997), the Eastern District set aside a default judgment against the surety under a notary bond because the plaintiff admitted that the signature on the documents in question was genuine. The court held that because the signatures were genuine, the surety had a meritorious defense because the notarization could not have been the proximate cause of any damages. *Yerkes* at 310.

Moreover, in *Sharpton v. Lofton*, (Mo. App. E.D. 1986) the Eastern District affirmed the grant of summary judgment in favor of the notary and her surety where the plaintiff’s failed to show how they were damaged or how the notarization of a signature in an irregular manner proximately caused a loss. See *Sharpton* at 776. The court held that the Plaintiffs “were correctly denied recovery.” *Sharpton* at 776. *Sharpton* and *Herrero* are instructive to the extent Appellants contend that the failure to record signatures in a journal makes the notarial act “irregular” in some manner.

In *Means v. Clardy*, 791 S.W.2d 433 (Mo. App. W.D. 1990) the court held that §486.355 RSMo. “spells out exactly when a notary and his surety are liable for damages.” *Means* at 436. In *Means*, the court reviewed facts that demonstrated the notary public notarized a bill of sale which contained a false signature. However, the court held because

the vendors were aware the signature was false, any damages they suffered were not proximately caused by the notarization. *Means* at 436.

Thus, under Missouri law, no civil liability can be imposed against the notary or its employer because the signatures were genuine and no damages were sustained by Appellants or caused by Respondent. Only one opinion found by either party addresses the threshold issue – whether the failure to enter notarizations in a journal can give rise to a cause of action. A pertinent opinion issued by the California Supreme Court, interpreting a statute similar to Missouri’s NPA in all relevant respects, found that failure to keep a notary journal can not give rise to civil liability. In *Kirk Corporation v. First American Title Co.*, 220 Cal. App. 3d 785 (1990) (L.F. 127), plaintiff-borrowers brought suit against, among others, a notary public for failure to keep records in a notary journal as required by statute. The plaintiffs in *Kirk Corporation* alleged that because the notary public did not keep a journal, they were unable to prove that they did not sign an instrument and as a result sustained damages. *Id.* The Court found that failing to keep a journal did not and could not proximately cause any damages to plaintiffs. *Id.* Like Missouri’s statute, the California NPA requires a notary to keep a sequential journal of all official acts performed as a notary, including the date, time and type of each official act, the character of every instrument acknowledged, the signature of each person whose signature is being notarized, fee charged, etc. Cal. Gov. Code § 8206. Consistent with Missouri’s statute, California’s code governing notaries also imposes civil liability for “official misconduct.” Cal. Gov. Code § 8214. **The *Kirk Corporation* opinion held that even though the notary public admitted she did not**

keep a journal, as required by Cal. Gov. Code § 8206, this did not provide a basis for imposing civil liability. *Kirk Corporation*, 220 Cal. App. 3d at 811-12.

The case law establishes no civil liability can be imposed for failing to keep a journal. Appellant maintains that “charging more than the maximum fee” is official misconduct which in fact gives rise to civil liability. However, Appellant admits that a fee of \$2.00 was charged for each of the six notarizations. Two dollars is in fact the “maximum fee” allowed under §486.350 RSMo. Thus, Appellant cannot as a matter of law claim a fee in excess of the maximum fee allowed by statute was imposed for the notarial service performed. Nor can Appellant provide any authority for the arguments that the failure to record a notarial act in a journal deprives the notary public of charging the maximum fee permitted by statute or that charging the statutorily permitted maximum fee is official misconduct.

B. The Missouri Secretary of State handbook offered by Plaintiff for the purpose of proving the Secretary of State’s interpretation of the notary public statute is neither correct nor does it supplant the Supreme Court’s independent judgment.

On page 15 of its Substitute Brief, Appellant argues that the Missouri Secretary of State “Document Certification Services Handbook” conclusively interprets the relevant statutes to mean that a \$2.00 fee can be charged by a notary public only when the notarization is “recorded in their notary journal”. (See Appellant’s Substitute Brief at pg. 15.) The use of the “Document Certification Services” in their argument and in their appendix is inappropriate for a number of reasons.

First, courts not bureaucrats or employees of administrative agencies, authoritatively interpret statutes. While the Supreme Court may defer to the Secretary of State's findings of fact in an administrative proceeding, the Supreme Court shall never defer to a Secretary of State's statutory interpretation. Any interpretation of a statute by the Secretary of State is always subject to the independent judgment of the Supreme Court. See *Community Bancshares, Inc. v. Secretary of State*, 483 S.W.3rd 821, 823 (Mo. 2001). See also, *Staley v. Missouri Director of Revenue*, 623 S.W.2d 246 (Mo. 1981); *Wimberly v. The Labor and Industrial Relations Commission of Missouri*, 688 S.W.2d 344 (Mo. 1985).

Secondly, the emphasis placed on the language of the handbook, particularly the capitalized words in the quoted sentence, are misused by Appellant to express that the Secretary of State forcefully interprets the statute in the way characterized by Appellant. Appellant offered no proof whatsoever that the handbook is the Secretary of State's interpretation of the statutes. Appellant offered no evidence to suggest that the handbook was reviewed by Commonwealth's employee or anyone at Commonwealth and never argued to the trial court that the handbook in any way contradicted Respondent's arguments for summary judgment. Moreover, Respondent, while arguing that the capitalized letters have some significance, does not inform the court that Secretary of State Blunt's version of the handbook attached in the appendix contains capitalized letters but Secretary of State Carnahan's version of the handbook contains no such notations. The differences in the handbooks reinforces that the handbook - any version - should not be considered by this Court.

Lastly, Appellant dangerously makes use of the handbook in its Appellate arguments but the handbook was never presented to the trial court. A party cannot raise an argument for the first time on appeal. *State v. Winfield*, 5 S.W.3rd 505, 515 (Mo. 1999). [Therein, the Supreme Court held that the parties are “bound by the arguments made and issues raised at trial and may not raise new and totally different arguments on appeal.”]

C. The conduct of the notary public in notarizing the signatures of Appellants was not “official misconduct” because the \$2.00 charge was not above the permitted maximum fee.

Appellants’ lawsuit is based on the language of §486.350.1 RSMo. which states that “the maximum fee in this state for notarization of each signature and the proper recording thereof in the journal of notarial acts is \$2.00 for each signature notarized.” Because Appellant charged \$2.00 for each notarization per the statute, Appellant contended that the language requires any notary to record the notarization in a journal as a condition to charging a fee of \$2.00. However, the statute simply sets out the maximum fee that can be charged so that separate or additional fees are not charged for witnessing the signature and recording this act in a journal kept by the notary. Appellant cites no case or statutory provision which prohibits the fee of \$2.00 when the notary fails to record the act in a journal. More importantly, while §486.350 RSMo. can be construed to read that charging more than \$2.00 per notarization can constitute “official misconduct” on the part of the notary, nothing in that provision implies that charging \$2.00 can ever be held to be “official misconduct”. Indeed, the \$2.00 charge complies with the statute and it is undisputed that Respondent charged the

\$2.00 fee for each of the six signatures notarized. Furthermore, no provision in the Notary Public Act can be construed to mean that failing to record notarial acts in a journal in itself constitutes “official misconduct”. In fact, the failure to record a notarial act in a journal is only a technical deficiency which neither constitutes “official misconduct” nor gives rise to civil liability in any way.

Since no damages were caused (or could be caused) by the notarization of genuine signatures, counsel for the class action plaintiffs crafted the argument in the court below that the failure to record the notarizations in a journal was “official misconduct” which deprived Respondent of the legal right to charge the permitted fee of \$2.00 per signature. In so doing, Appellants turn the Notary Public Act inside out and attempt to create a wrong where none exists.¹

Several Missouri opinions, some discussed previously, have defined “official misconduct” under the notary public act. However, where the signature is admitted to be authentic, the notary is held not to have committed “official misconduct”. See *Herrero*,

¹ The Appellate Court in its memorandum affirming the judgment pursuant to Rule 84.16(b) found that Plaintiff’s interpretation of the statute would be in contravention to the legislature’s intent because the legislature had established exceptions to the recording requirement. “Applying Plaintiffs’ argued interpretation of §486.350, the Notary Act therefore would prohibit notaries from charging a fee for these excepted acts, a result obviously not intended.” See Memorandum issued, Appeal No. ED 88958, June 29, 2007.

supra. Likewise, in *Dickey, supra*, the court held that where the authenticity of the signature was not challenged, there can be no “official misconduct”. The *Dickey* court noted that no Missouri case has held a notary to be liable in a situation where the notarization was technically deficient but the signature was authentic. See *Dickey* at 584. Under *Dickey* and *Herrero*, “official misconduct” under the act must be more than a “technical deficiency” and must relate to a notarization of signatures that are not genuine or authentic. *Herrero* at 21.

§486.200(6) RSMo. defines “official misconduct” consistent with Missouri case law. §486.200(6) RSMo. reads: (6) “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”. Both *Herrero, supra* and *Dickey, supra* hold that the notary’s *duty* is to acknowledge the authenticity of the signature. *Herrero* at 22. As a matter of law, neither Respondent nor its employee can be held to have committed “official misconduct” because the signatures notarized were genuine and because the fee charged for the service did not exceed the permissible fee set out in the statute. As such, no basis for liability exists.

Appellants next argued that a notarization with no subsequent recordation in a journal is a “half act” or an “incomplete act” for which Respondents cannot charge a fee. The Appellants argument is dependent on the notion that if the notarization is not complete, then the charge of \$2.00 levied for the service must be excessive. Appellants’ argument fails because the notarial act is complete upon witnessing a genuine signature and any irregularity or violation that follows does not invalidate the notarization. See *Herrero, Dickey, supra*.

See also *New v. Currough*, 370 S.W.2d 323, 326 (Mo. 1963) [notary omitted expiration date from notarization but this did not invalidate the notarization; also, a fee of \$5.00 charged by notary in violation of §112.050 RSMo., although illegal, would not invalidate ballot because the fee was levied after the ballot was properly notarized and cast]. See also *Harris v. Purcell*, 973 P.2d 1166 (S.C. Ariz., en banc. 1998) [notarizations of signatures on a ballot initiative were valid once notarized even though notaries failed to keep a journal of their notarial acts as required by statute].

The recordation by a notary in a journal does not effect the validity or effectiveness of the document notarized. Under Appellants' "half-act" argument, no notarization on a document would be effective until the notary, subsequently and independently, records the notarial act in a journal. The argument runs contrary to the Notary Public Act and the rationale for maintaining a journal. Under the plain language of §486.265 RSMo. the notary keeps a "record of his or her official acts in a permanently bound journal". Clearly, the requirement to record notarial acts in a journal is independent of the duty to witness genuine signatures on official documents. Likewise, on this point, the journal is not kept for the benefit of the signatories. It is, according to §486.265 RSMo. "the exclusive property of the notary". Thus, there can be no connection between the fee charged to the signatory and the journal.

Appellants' argument is a non-sequitur. It does not logically follow that keeping a subsequent record of the notarization is included in the act of notarization. Logically, the notary makes a record of the notarial act once the act is complete.

D. Appellant could not have demonstrated that the employer consented to the notary public’s “official misconduct”.

In its appeal, Appellant argued that “*Commonwealth* committed official misconduct”. See Appellant’s Reply Brief at pg. 7. Appellant’s Substitute Brief asserts that “*Commonwealth*” performed an incomplete act in [performing the notarizations]. See Appellant’s Substitute Brief at pg. 16. Appellant has ignored throughout these proceedings the protection afforded the employer of a notary public under §486.360 RSMo. from claims for damages.

Because the notary did not commit “official misconduct” the employer of the notary cannot be held liable for damages. It follows without further proof that Respondent Commonwealth could not have been found to have *consented* to “official misconduct” that did not occur. Furthermore, Appellants failed to plead this essential element of their claim or demonstrate that the notary public’s employer in some way condoned, permitted, endorsed or *consented to* any official misconduct on the part of the notary public.

All material facts in the court below were undisputed. (L.F. 115, 151). Appellant did not submit additional undisputed facts concerning the employer’s liability. Accordingly, the trial court properly entered judgment in favor of Respondent.

E. Appellant also argued, for the first time on Appeal, that “the only real issue” is whether Commonwealth can collect \$1.00 per signature and the argument fails as a matter of law.

Appellant never raised the argument concerning §486.350(2) RSMo. before the trial court. Nevertheless, Appellant’s argument that \$1.00 is an appropriate charge for “any other notarial act performed” under §486.350(2) RSMo. is meritless. The \$1.00 charge under the statutory provision is reserved for notarial acts *that do not involve* notarizing signatures. Appellant agrees (see Appellant’s Substitute Brief at pg. 16) Appellant’s case is based on notarial acts of a notary that did in fact involve notarizing signatures. As such, the provision is wholly inapplicable to the facts of this case and Appellant’s arguments must fail.

II. Appellants’ Second Point on Appeal should be denied and the judgment of the trial court affirmed because Appellants’ common law unjust enrichment claim is preempted by the Notary Public Act and Respondent was not unjustly enriched by receiving a fee for notarization which it was legally entitled to charge.

Under Missouri law, “where a code or statute creates a new right or liability that did not exist at common law or under prior statutes, and also provides a specific remedy for the enforcement thereof, as a general rule such statutory remedy is *exclusive* . . . In such a case the prescribed statutory remedy operates as a negation of, and impliedly excludes, any other remedy, such as a common-law remedy; and the whole matter of right and remedy is within the statute, and no part of either otherwise exists. See *Gales v. Weldon*, 282 S.W.2d 522, 529 (Mo. 1955). Thus, Appellants cannot maintain a common law claim for unjust enrichment as a matter of law because the Notary Public Act provides the exclusive remedy.

For violations of Missouri’s Notary Public Act, the statute specifically sets forth the civil remedy available (see §486.355 RSMo.) and even sets out criminal penalties

(§486.370.1 RSMo.) for any violations of the act. The act sets forth when a notary can be disqualified as serving as a notary in a transaction. (§486.255 RSMo.). More relevant to the case against Respondent, the act specifically sets out when an *employer* of a notary public can be held liable and the remedy associated therewith. (See §486.360 RSMo.) Because Missouri’s Notary Public Act provides a specific remedy for the enforcement of this statute, the statutory remedy is exclusive.

Appellants claim for unjust enrichment is based on the same facts as its claim under the Notary Public Act – that in notarizing six signatures and charging \$12.00 for that service, Respondent, as the employer for the notary public, was unjustly enriched because the notary public did not record the entries in a journal. Respondent cannot, as a matter of law, be held to have been “unjustly” enriched by charging a fee it was legally entitled to charge.

Appellants’ wholly ignore in their brief, the failure on their part to allege or demonstrate that the retention of the fee by Commonwealth was inequitable. The most “significant” element of a cause of action for unjust enrichment is whether the retention of the benefit by a defendant would be inequitable. See *Associate Engineering Co. v. Webbe*, 795 S.W.2d 606, 608 (Mo. App. E.D. 1990). Perhaps Appellants ignore this element because the notarial acts performed were a necessary and valuable service. After all, the refinancing transaction in which the service was performed (and which benefited Appellants) required the notarization of the three documents and six signatures in order for the refinancing to close. Notarizing the six signatures on the loan and closing documents was a necessary part of the closing. Respondent cannot, as a matter of law, be held to have

inequitably retained the \$12.00 fee or be unjustly enriched as a result of retaining said fee in that the service of notarizing the six signatures was performed for Appellant's benefit. As stated before, it was undisputed below that the signatures on the documents notarized were genuine and that the notary public appropriately witnessed the signatures. Appellants' Point II should be denied.

III. Appellants' Third Point on Appeal should be denied and the dismissal of Count III should be affirmed because Missouri's Merchandising Practices Act does not apply to Respondent in that it is a company under the direction and supervision of the Director of the Department of Insurance and this Court, as the trial court properly did, can take judicial notice of that fact.

In the court below, Respondent moved to dismiss Count III of Appellants' Petition which was based entirely on Missouri's Merchandising Practices Act, §407.010 et seq. RSMo. The plain language of the Act states that it does not apply to "any institution or company that is under the direction and supervision of the Director of the Department of Insurance . . ." See §407.020.2(2).

Although Appellants argue there is no proof that Respondent is an insurance company, the legal file demonstrates that Appellants signed the survey affidavit to induce Respondent to issue a policy of title insurance (L.F. 95) and that Respondents paid a premium for a title insurance policy. (L.F. 83).

The trial judge took judicial notice of the court file and of the fact that Commonwealth Land Title Insurance Company is under the direction of the Department of Insurance. (L.F.

153). As such, no further proof was required. This Court is entitled to take judicial notice of that same fact. In Missouri, Courts are bound to take judicial notice of domestic statutes and to dispense with formal proof of that evidence. *Newson v. City of Kansas City*, 606 S.W.2d 487 (Mo. App. W.D. 1980).

§381.003 RSMo. states that “all provisions of the insurance code applying to insurance and insurance companies generally shall apply to title insurance, title insurers, and title agents”. Missouri’s insurance code establishes the Department of Insurance and outlines explicitly the powers, authorities, and duties of the Director of the Department of Insurance. See §374.045, §374.040 RSMo. §374.040 establishes the Director’s duty to regulate each aspect of any insurance company’s authority to transact insurance business in this state and to regulate the business of insurance generally. As an insurance company transacting business in this state, Respondent, by statute, is under the direction and supervision of the Director of the Department of Insurance and this Court may take judicial notice thereof.

Judicial notice is both a rule of evidence and an instrument of judicial reasoning. See *Endicott v. St. Regis*, 443 S.W.2d 122 (Mo. 1969). As such, courts may also take judicial notice of facts that are common knowledge. See *National Union Fire Insurance Company v. Nevilles*, 274 S.W. 503 (Mo. App. 1925). Here, it is common knowledge that Commonwealth Land Title Insurance Company is under the direction and supervision of the Department of Insurance. Moreover, Appellants would not have maintained they had

jurisdiction over Respondent had it not been an insurance company authorized to transact business in the State of Missouri.

In dismissing Counts III of Plaintiff's Petition, the trial judge took judicial notice of Commonwealth's status as a title insurance company transacting business in Missouri and required no further proof from defendant. The plain language of Missouri's title insurance law, the insurance code and the clear exception within Missouri's Merchandising Practices Act compelled the trial judge to dismiss Count III. This court should affirm the trial court's ruling.

IV. The judgment of the trial court must be affirmed and certain arguments and materials submitted by Appellants should be stricken from the record because Appellants have inappropriately asserted for the first time on appeal an argument not raised before the trial judge and have inserted in the appendix an exhibit not admitted before the trial court.

Appellants attempt to raise new arguments for the first time on appeal and introduce material that is not part of the record on appeal. This Court should not consider the new arguments or material.

Appellants now argue, for the first time on appeal, that the Notary Public Act allows Respondent to charge only \$1.00 for the notarial services performed. This argument was never raised at the trial court level. As an afterthought, Appellants attempted to make this argument part of the legal file by filing a motion to vacate summary judgment after filing their notice of appeal. The attempt to include the motion in the legal file was disingenuous

and because the argument was first asserted in a pleading filed after the trial court lost jurisdiction, this court must not consider the argument. It is well established that upon filing a Notice of Appeal, the trial court loses jurisdiction over the case and suspends further exercise of all judicial functions by the trial court except for the exercise of ministerial or executive functions. *Brock v. Steward*, 519 S.W.2d 365, 367 (Mo.Ct.App., 1975); see also *Herrick Motor Co. v. Fischer Oldsmobile Co.*, 421 S.W.2d 58, 62 (Mo.Ct.App., 1967) and cases cited therein.

A party cannot raise an argument for the first time on appeal. *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo.App., 1996) (citing *D.E. Properties v. Food For Less*, 859 S.W.2d 187, 201 (Mo.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.”).

Appellants also attached a copy of the Document Certification Services handbook published by the Secretary of State for the State of Missouri. (Appellants’ Appendix at 20 – 27). This document should not be considered by this Court because it is not part of the record on appeal.² The Missouri Court of Appeals shall not consider a document that was not a part of the record on appeal. *Denny’s Inc. et al. v. Avesta Enterprises, Ltd., et al.*, 884

² Respondents filed a Motion to Strike with the Appellate Court.

S.W.2d 281, 289 (fn. 5) (Mo.App. W.D., 1994) *and cases cited therein*.

Lastly, the handbook is improperly included in the Appendix because it was not introduced at trial or made part of the appellate record by stipulation. See Rule 84.04(h) and local Rule 365; see *State v. Strong*, 142 S.W.2d 702 (Mo. 2004); *Grace Advisors, Inc. v. Shannon*, 130 S.W.3d 750 (Mo. App. E.D. 2004); *21 West, Inc. v. Meadowgreen Trails, Inc.*, 913 S.W.3d 858 (Mo. App. E.D. 1995).

REQUEST TO AFFIRM

For all of the reasons set forth above, the trial court did not err in entering summary judgment against Appellants on Counts I and II of their Petition for damages and dismissing Count III. Respondent requests this court affirm the final judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was mailed, postage prepaid, this 7th day of November, 2007, to Fernando Bermudez, Esq., Green Jacobson & Butsch, P.C., 7733 Forsyth Blvd., Suite 700, Clayton, Missouri 63105, along with a copy of a floppy disk containing a copy of the Brief of Respondent.

MISSOURI SUPREME COURT

LISA L. ROKUSEK,)
JENNIFER HUMAN,)
)
Appellants,) Appeal No. SC 88763
)
vs.)
)
COMMONWEALTH LAND TITLE)
INSURANCE COMPANY,)
)
Respondent.)

**CERTIFICATE OF COMPLIANCE PURSUANT
TO MISSOURI SUPREME COURT RULE 84.06(c)**

COMES NOW William L. Sauerwein, counsel for Respondent, and for his Certificate of Compliance Pursuant to Missouri Supreme Court Rule 84.06(c) states as follows:

1. To the best of my knowledge, information and belief, Respondent’s claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Substitute Brief of Respondent, were formed after reasonable inquiry under the circumstances. Moreover:

(a) Respondent’s claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Substitute Brief of Respondent, are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b) Respondent’s claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Substitute Brief of Respondent, are warranted

by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(c) the allegations and other factual contentions in the Substitute Brief of Respondent have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(d) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. The Substitute Brief of Respondent complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. The Substitute Brief of Respondent contains 7,366 words.

Respectfully submitted,

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MISSOURI SUPREME COURT

LISA L. ROKUSEK,)
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)
COMMONWEALTH LAND TITLE)
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)
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**CERTIFICATE OF COMPLIANCE PURSUANT
TO MISSOURI SUPREME COURT RULE 84.06(g)**

COMES NOW William L. Sauerwein, counsel for Appellants, and for his Certificate of Compliance Pursuant to Supreme Court Rule 84.06(g) and Local Rule 361 states as follows:

1. Respondent contemporaneously herewith files a double-sided, high density IMB-PC compatible 1.44 MB, 3 1/2-inch floppy disk that contains the Brief of Respondent.
2. The Substitute Brief of Respondent was created using Microsoft Word.
3. Respondent has scanned the enclosed floppy disk with PC-Cillin 2000 software and said floppy disk is virus-free.

Respectfully submitted,

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