IN THE SUPREME COURT OF MISSOURI

No. SC91639

BONNIE HARGIS
Plaintiff-Appellant

vs.

JLB CORPORATION d/b/a GOLDEN OAK LENDING
Defendant-Respondent

ON APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
THE HONORABLE ROBERT COHEN
No. 09SL-CC00676

PLAINTIFF-APPELLANT'S SUBSTITUTE BRIEF

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ORAL ARGUMENT REQUESTED

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I. JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over the instant appeal because it involves the validity of a statute and because this Court granted Plaintiff's Application For Transfer. The Supreme Court has exclusive appellate jurisdiction over all cases that involve the validity of a statute of this State. Mo. Const. art. 5, § 3. Because the Missouri judiciary is the sole arbiter of what constitutes the practice of law in this State, Eisel v. Midwest BankCentre, 230 S.W.3d 335, 338 (Mo. 2007), the Missouri Appellate Court effectively nullified the procurement provision of Section 484.010.2 when it held that this provision was "not supported by the case law", Pl.'s App. A116. In other words, the Appellate Court held that there was a "a conflict between the text and activities that this Court has determined to be the authorized practice of law." Eisel v. Midwest BankCentre, 230 S.W.3d 335, 339 (Mo. 2007). Because this case involves the validity of Section 484.010.2, appellate jurisdiction is exclusively lodged in this Court.

Furthermore, the Supreme Court has jurisdiction over this appeal pursuant to Supreme Court Rule 83.04 because it granted Plaintiff's Application For Transfer on April 26, 2011. Pl.'s App. 147.

II. STATEMENT OF FACTS

On or about January 12, 2009, Plaintiff Bonnie Hargis entered an agreement with JLB Corporation ("JLB") to refinance her home in Barnhardt, Missouri. Pl.'s App. A7-10 (Pl.'s Settlement Statement). The settlement charges for financing her home amounted to $21,285.23, while the payoff to her former creditor (i.e., the principal of the loan) was $171,072.77. Id. at A7. Her charges included, *inter alia*, a "Loan Origination Fee" of $1,890.50, a "Loan Discount" of $1,923,58, a "Processing Fee" of $899.00, an "Underwriting fee" of $550.00, a "Broker Fee" of $900.00, and an "Administration Fee" of $208.00, all of which were paid to JLB. Id. at A9. These fees were added to the principal of Plaintiff's loan, Id. at A7-10, thereby eliminating a significant upfront payment for refinancing her home. JLB acted as the loan correspondent mortgagee for this loan; U.S. Bank N.A. was the sponsoring lender.[1] Id. at A7(listing JLB as the lender); A44(Depo. John Paci (Nov. 18, 2009))(explaining how this was a correspondent loan, and how U.S. Bank N.A. subsequently bought the mortgage). In other words, Defendant charged a broker fee although Plaintiff's mortgage was not a "broker loan", and no mortgage broker participated in the transaction. Id. at A44(John Paci explaining how this loan was not a "broker loan").

[1] See 24 C.F.R. § 202.8 (effective until May 19, 2010)(defining loan correspondent mortgagee and lender). See also 24 CFR § 202.8(c)(effective on May 20, 2010)(indicating that the definition of loan correspondent in the previously enacted regulations remains effective).

On February 13, 2009, Plaintiff Bonnie Hargis filed suit against JLB Corporation ("JLB"). Pl.'s App. A11-18(Pl.'s Class Action Petition). Plaintiff complained of only the $899.00 "Processing Fee" and the $208.00 "Administration Fee" in her initial pleadings. Id. at A12. Her Petition contained 3 Counts. In Count I, Plaintiff alleged that Defendant violated Section 484.010 *et seq.* of the Missouri Code by engaging in the unauthorized practice of law. Id. at A15-16. In Count II, Plaintiff alleged that Defendant violated the Missouri Merchandising Practices Act, VAMS 407.010 *et seq.* by engaging in the unauthorized practice of law. Id. at A16-7. And, in Count III, Plaintiff alleged that Defendant was unjustly enriched by Plaintiff. Id. at A17.

On April 2, 2009, Defendant filed its Answer. R. 19-25. Defendant proceeded to file a First Amended Answer, R. 25-32, and a Corrected First Amended Answer, R. 198-203.

On August 5, 2009, JLB filed its Motion for Summary Judgment, which read as follows:

> Defendant JLB Corporation d/b/a Golden Oak Lending (JLB), pursuant to Missouri Rule of Civil Procedure 74.04(c)(6), moves this Circuit Court to enter summary judgment against Plaintiff Bonnie Hargis.
>
> 1. On February 13, 2009, Plaintiff filed a Petition against JLB alleging that JLB had engaged in the unauthorized practice of law, violated the merchandizing practices act, and had been unjustly enriched. Specifically, Plaintiff alleges that JLB illegally charged her a "Processing Fee" and an "Administrative Fee" for the preparation of legal documents

and by doing so engaged in the unauthorized practice of law or law business.

2. Although class allegations have been made, this court has not determined by order whether the class is to be maintained.

3. JLB charged fees to Plaintiff for tasks associated with processing her loan, such as gathering forms and documents, communications with the underwriter, and obtaining additional information when required by the underwriter. (Paci Affidavit ¶4). JLB employees do not draft or prepare legal documents. (Paci Affidavit ¶3)

4. JLB did not levy a charge for "document preparation."

5. Therefore, there is no genuine issue of material fact regarding whether JLB engaged in the unauthorized practice of law or law business and Summary Judgment should be entered in favor of JLB and against Plaintiff Bonnie Hargis.

6. JLB incorporates by reference as if fully set forth herein its Memorandum in Support of Motion for Summary Judgment.

WHEREFORE, Defendant JLB requests this Court to enter Summary Judgment in favor of JLB and against Plaintiff Bonnie Hargis and for such other and further relief as this Court deems just and proper.

Pl.’s App. A19-20 (JLB Corporation’s Motion for Summary Judgment).

Attached to JLB's motion was the affidavit of John Paci, a shareholder of JLB, who testified that "JLB did not draft or prepare legal documents for Plaintiff." Id. at 22. Mr. Paci further testified in that affidavit:

> The "processing fee" and "administrative fee" were charged for tasks associated with processing the loan which include gathering forms and documents, communications with the underwriter, and obtaining additional information when required by the underwriter.

Pl.'s App. A22-23(Aff. John Paci (July 31, 2009)).

JLB also file a Memorandum in support of its Motion on August 5, 2009, which read as follows:

> Comes now Defendant JLB Corporation d/b/a Golden Oak Lending ("JLB") and for its Motion for Summary Judgment against Plaintiff Bonnie Hargis states as follows:
>
> I. INTRODUCTION
>
> On February 13, 2009, Plaintiff filed a Petition against JLB alleging JLB had engaged in the unauthorized practice of law, violated the merchandizing practices act, and had been unjustly enriched. Although class allegations have been made, this court has not determined by order whether the class is to be maintained.
>
> Specifically, Plaintiff alleges that JLB illegally charged her a "Processing Fee" and an "Administrative Fee" in connection with a loan she received. Her conclusory allegation is that a "processing fee" and an

"administrative fee" is evidence that JLB engaged in the unauthorized practice of law or law business. JLB has not engaged in the unauthorized practice of law or law business and this Court should enter summary judgment against Plaintiff and in favor of JLB.

II. LEGAL FRAMEWORK FOR SUMMARY JUDGMENT

A motion for summary judgment must be granted if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Mo. R. Civ. P. 74.04(c)(6). Once a prima facie case for summary judgment is made, the only way the non-movant can defeat summary judgment is to place in genuine dispute one or more of the material facts on which the movant relies for summary judgment. Firestone, Firestone v. VanHolt, 186 S.W.3d 319, 325 (Mo. Ct. App. W.D. 2005). “A ‘genuine issue’ is a dispute that is real, not merely argumentative, imaginary or frivolous.” ITT Commercial Fin. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371,382 (Mo. banc 1993). Where the "genuine issues" raised by the non-movant are merely argumentative, imaginary, or frivolous, summary judgment is proper. See ITT Commercial Fin., 854 S.W.2d at 380.

JLB is entitled to summary judgment because there is no “genuine issue of material fact” in this case. Plaintiff was not charged a fee for the preparation of legal documents. (Paci Affidavit ¶2). The fees charged to Plaintiff were for processing the loan, which consists of tasks such as

gathering forms and documents, communications with the underwriter, and obtaining additional information when required by the underwriter. (Paci Affidavit ¶4). In essence, JLB worked making sure the loan process was successful and that plaintiff ultimately received her loan. JLB employees do not draft or prepare legal documents. (Paci Affidavit ¶3).

In Eisel v. Midwest Bank Centre, 230 S.W. 3d 335 (Mo banc. 2007), the Missouri Supreme Court found that a "document preparation" charge for the preparation of legal documents, such as promissory notes and deeds of trust, was the unauthorized practice of law. JLB does not charge for completion of legal documents, JLB did not levy a "document preparation" charge, nor do the employees of JLB prepare legal documents. Therefore, JLB is entitled to summary judgment on Counts I, II, and III[2] of Plaintiff's Petition.

Pl.'s App. A24-26.

On September 3, 2009, Plaintiff filed a responsive pleading and asked the Court for limited discovery pertaining to Defendant's request for judgment on her unauthorized practice of law count. Pl.'s App. A27-30(Plaintiff's Response And Request In The Alternative For A Continuance). Ms. Hargis explained in her affidavit that she needed the following discovery in order to respond to Defendant's Motion: a) two interrogatories

[2] Defendant's request for relief in its Memorandum is the only time it mentions Count III in all of its pleadings.

pertaining to Defendant's "Processing Fee" and "Administration Fee"; b) those documents requested in her Request For Production 4; c) the deposition of John Paci; and, d) the deposition of John Paci or the person that Defendant identified in response to Interrogatory 6. Pl.'s App. A31-32 (Aff. Bonnie Hargis (Sept. 2, 2009)). The sought discovery exclusively concerned Plaintiff's claims for the unauthorized practice of law and did not concern Count III of her Petition. In an October 15, 2009 docket note, the Court granted Plaintiff the opportunity to perform the limited discovery that she had outlined in her affidavit. R. 3.

On November 18, 2009, Plaintiff took the deposition of John Paci, the vice president of JLB Corporation (d/b/a Golden Oak Lending). Pl.'s App. A33-53(Depo. John Paci (Nov. 18, 2009)). He was not a licensed mortgage broker or a licensed attorney. Id. at A34. In fact, no-one at his company had any sort of Missouri licensure. Id. at A36. Mr. Paci's company was in the business of "matching them [borrowers] up with an investor to get a loan." Pl.'s App. A42. In other words, Defendant ran a "middleman service between the borrower and the lender." Pl.'s App. 41. Mr. Paci explained:

> Q. [T]he administration fees, the broker fees, and the loan origination fees, those are all fees charged by Defendant for actions taken on behalf of its clients, correct, in obtaining a mortgage?
>
> A. These are charges for services we provide, which is matching up with an investor to get a loan.

Q. And in matching them up with an investor, you're acting on behalf – Defendant is acting on behalf of its clients, correct?

A. Yes.

Id. at A42. Defendant would gather information from the borrower and communicate that information to the underwriter/investor.[3] Pl.'s App. A38-39. Defendant would "[m]eet with the borrower, negotiate with the lender, process the loan [and] make sure the loan gets closed." Pl.'s App. 43. Then, Defendant would charge a processing fee and the administration fee for gathering forms or documents related to Plaintiff's mortgage. Id. at A37, 38, 40. Those documents included the note, the mortgage, the deed of trust and the settlement statement. Id. at A38. Defendant also charged for "prepar[ing] the loan application [and] the disclosures." Id. All of these documents were necessary for and related to Plaintiff's mortgage, which is "a security instrument tying the note to the property." Id. The loan officer would "do things like make copies and put a file together". Id. Defendant either obtained these documents from the investor or from a document company called Document Systems, or would use a computer program called DocMagic to create these documents. Id.

On December 11, 2009, Plaintiff responded to Defendant's Motion for Summary Judgment. Pl.'s App. A54-57. Plaintiff argued that Defendant's Motion must be denied because Defendant failed to file a statement of undisputed facts in violation of Missouri

[3] U.S. Bank N.A., who was the investor for Plaintiff's loan, was also her underwriter. Pl.'s App. 44.

Supreme Court Rule 74.04(c)(1). Id. at A54. Plaintiff further argued that the following facts precluded entry of judgment:

a. Whether Defendant charged for preparing Plaintiff's mortgage documents, Exhibit 1, Depo. John Paci 18:7-8; 19:11-12; 24:7-15 (Nov. 18, 2009);

b. Whether Defendant charged for obtaining Plaintiff's mortgage documents, Exhibit 1, Depo. John Paci 16:13-14; 17:4-5; 19:11-12 (Nov. 18, 2009), Exhibit 2, Aff. John Paci ¶4 (July 31, 2009);

c. Whether Defendant charged for representing Plaintiff in securing or tending to secure a mortgage, Exhibit 1, Depo. John Paci 35:8-18 (Nov. 18, 2009);

d. Whether Defendant received or obtained possession of the plaintiff's money, Plaintiff's Class Action Petition at ¶¶ 32-34;

e. Whether Defendant thereby appreciated a benefit, Plaintiff's Class Action Petition at ¶¶ 32-34; and,

f. Whether Defendant's acceptance and retention of the money was unjust, Plaintiff's Class Action Petition at ¶¶ 32-34.

Id. at A55. Plaintiff explained in the memorandum she filed to accompany her Response that Defendant engaged in the unauthorized practice of law in three different ways: 1) by charging for preparing documents such as a loan application; 2) by charging to gather documents related to Plaintiff's mortgage; and, 3) by charging for representing its clients to obtain a property right. Id. at A59-64.

On December 17, 2009, over Plaintiff's objection, Defendant filed its Statement Of Undisputed Facts. Pl.'s App. A65-66. It read in whole:

> 1. JLB did not charge a fee for preparation of any legal documents. (Paci Affidavit ¶2).
>
> 2. JLB did not draft nor prepare any legal documents for Plaintiff. (Paci Affidavit ¶2).
>
> 3. The "processing fee" and "administrative fee" were charged for tasks associated with processing the loan which included gathering forms and documents, communications with the underwriter, and obtaining additional information when required by the underwriter. (Paci Affidavit
>
> 4. JLB did not draft or prepare any legal documents for Plaintiff. (Paci Affidavit ¶3).

Pl.'s App. A65(JLB's Statement Of Undisputed Facts).

On December 28, 2009, Defendant filed its Reply with respect to its Motion for Summary Judgment, wherein it asserted two new arguments in support of summary judgment. Pl.'s App. A67-75. First, Defendant argued that it did not "separately and specifically bill for preparation of any documents (legal or otherwise)". Id. Second, Defendant argued that the "Court should enter summary judgment for JLB because JLB's actions were authorized by Chapter 443 of Missouri Statutes and by federal mortgage regulations". Id. at A73-74. Each of these arguments were raised for the first time following the discovery Plaintiff performed with respect to summary judgment.

On December 28, 2009, Plaintiff filed its Response to Defendant's Statement of Undisputed Facts, arguing that the facts listed in her Response precluded entry of judgment. Pl. App. A76-78.

On January 29, 2010, Plaintiff filed her Surreply with respect to Defendant's Motion for Summary Judgment. Pl.'s App. A79-88. Plaintiff argued that the Court could not consider the new issues raised by Defendant for the first time in its Reply, Id. at A80-81, and explained that she was prejudiced by the untimely arguments.

> Plaintiff is prejudiced by the fact that Defendant raises its "separate fee" argument for the first time in its Reply. Plaintiff performed discovery in order to prepare her Response, and Plaintiff did not have notice whereby she could focus her discovery on the issue of whether Defendant charged separate fees or varied its customary charges for the unauthorized practice of law.

Id. at A83. Plaintiff also argued that that Defendant violated Rule 74.04(c)(3) by failing to file an additional statement of material facts with respect to the new issues it raised in its Reply. Id. at A81-82. Plaintiff alternatively argued that the Supreme Court of Missouri had acknowledged that a "processing fee" represented a fee for the unauthorized practice of law, and that Defendant admitted it varied its customary charges for the closing services it provided. Id. at A82-83. Additionally, Plaintiff explained that her Unjust Enrichment claim was an alternative theory that would allow for recovery even in the absence of a fee for the unauthorized practice of law. Id. at A84.

On the same day, Plaintiff moved the court to file a First Amended Class Action Petition. Pl.'s App. A89-106. Count I specified that Defendant had engaged in the unauthorized practice of law by:

> (a) drawing or preparing documents that affect or relate to Plaintiff's mortgage;
>
> (b) procuring or obtaining documents that affect or relate to Plaintiff's mortgage; and,
>
> (c) assisting in the drawing or preparation of documents that affect or relate to Plaintiff's mortgage.

Id. at A94. In Count II, Plaintiff alleged that Defendant's unauthorized practice of law "were deceptions and unfair practices as defined by the Merchandising Practices Act." Id. at A101.

Count III of this proposed petition underwent the greatest overhaul. Pl.'s App. A101-105. Plaintiff explained that Count III was an "alternative Count [that was] brought under the Missouri common law theory of money had and received." Id. at A101. Plaintiff explained that under federal regulations that persons cannot receive any fee for a federally related loan except for "services actually performed, for goods actually provided or for facilities actually furnished", and alleged:

> Defendant's compensation was not reasonably related to the goods or facilities actually furnished or services it actually performed. Defendant unjustly received and retained Plaintiff's money that was paid or given in violation of federal law and regulations.

Id. at A104-105. In other words, to the extent that Defendant's payments did not represent fees for the unauthorized practice of law, Plaintiff sought to recover money that was improperly collected for services that were not provided. This proposed amendment to Count III was not granted by the Trial Court and is not at issue in this appeal.

On January 28, 2010, Defendant JLB filed a response to Plaintiff's motion for leave, arguing that although the court had not allowed class discovery, that the scheduled date for trial was April 26, 2010 and the "[t]he deadline for depositions of parties passed long ago". R. 309-311.

On March 8, 2010, the Court granted Defendant's Motion for Summary Judgment, and entered judgment for Defendant JLB. Pl.'s App. A107. Plaintiff was surprised that the Court entered judgment on all counts of her Petition because Defendant had not moved for summary judgment with respect to Plaintiff's common law claim for money had and received.

On March 26, 2010, Plaintiff filed her Motion To Amend, Vacate, Correct Or Modify Judgment. Pl.'s App. A108-110. Plaintiff wrote:

> 4. The instant case involves multiple claims, and Plaintiff is unable to determine from the Court's March 8, 2010 entry whether the Court entered judgment on all of Plaintiff's claims.
>
> 5. If on March 8, 2010 the Court entered judgment on one or more, but not all, of Plaintiff's claims, Plaintiff asks the Court to do the following:
>
> a. "[M]ake an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or

other relief is not in controversy, and directing further proceedings in the action as are just." VAMR 74.04(d).

b. Permit Plaintiff to perform discovery on the remaining Count(s).

c. Certify the adjudicated Count(s) for immediate appeal pursuant to Rule 74.04(b).

6. Alternatively, if the Court dismissed Plaintiff's entire case with its March 8, 2010 entry, Plaintiff asks the Court to reconsider its Judgment and incorporates by reference all pleadings Plaintiff filed in response to Defendants' Motion for Summary Judgment. **Plaintiff further argues that Defendant's Motion never addressed Plaintiff's common law count for money had and received, and that Plaintiff was never afforded the opportunity to perform discovery with respect to that count.**

Pl.'s App. 109(emphasis added). Plaintiff further asked the court to include with its order findings of fact and conclusions of law. Id.

On the same day, the Circuit Court denied Plaintiff's Motion To Amend, Vacate, Correct Or Modify Judgment without any findings of fact or conclusions of law. Pl.'s App. A111.

On January 25, 2011, the Missouri Appellate Court, Eastern District, affirmed the judgment of the Trial Court. Pl.'s App. A112-120. The Appellate Court began its discussion of the unauthorized practice of law by citing this Court's opinion in Carpenter v. Countrywide Home Loans, 250 S.W.3d 697, 702 (2008) for the proposition that, in order to give rise to liability for the unauthorized practice of law, a litigant must

demonstrate: "(1) the preparation of conventional legal documents, and (2) the charging of a separate fee for the legal documents' preparation."[4] In analyzing what "mortgage related forms" constituted "conventional legal documents, the Court noted that "the key issue is content, not form." Pl.'s App. 115(citing Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855, 859 (Mo. banc 1952)). The Appellate Court appears to have construed Plaintiff's argument to be solely based upon the fact that Defendant filled out pre-printed forms, holding:

> Whether a form is pre-printed or otherwise has no bearing on the legal skill needed to prepare it. But apparently Hargis just assumes that if a pre-printed mortgage-related form can ever be a "conventional legal document," then all mortgage-related forms must be conventional legal documents.

Id. at 115. The Court further concluded: "even if JLB had prepared conventional legal documents, Hargis fails to offer any facts suggesting that JLB charged her a separate fee to prepare them." Id. In short, the Eastern District rejected Plaintiff's argument that it engaged in the unauthorized practice of law by preparing mortgage documents (i.e., the loan application and disclosures).

[4] Plaintiff disputes these conclusions of law, stating that the Supreme Court has never used the term "conventional legal documents" nor compiled a list thereof, and has not required a "separate fee" for a finding of liability.

The Appellate Court rejected Plaintiff's other arguments with more vitriol, finding them to be "even less persuasive than the first." Pl.'s App. A115-116. The Appellate Court nullified the procurement provision of Section 484.010.2 with a single sentence: "The former claim [i.e., that Defendant engaged in the unauthorized practice of law by procuring legal documents] is not supported by case law and directly contradicts state and federal statutory law. See §§ 443.803, 443.805, 443.812; see also 24 C.F.R. § 3500." Pl.'s App. A116. The Appellate Court also rejected Plaintiff's argument that Defendant engaged in the unauthorized practice of law by charging to represent clients with respect to real property, stating that this argument "effectively morphs the entire mortgage brokering business into 'the practice of law,' an interpretation that is patently unreasonable." Id. The Court expressed its lack of surprise with its finding that Plaintiff "must mince words and parse meanings out of context to claim these actions were unauthorized practices of law." Id.

Additionally, the Appellate Court rejected Plaintiff's argument that the trial court erred by dismissing Plaintiff's third count because Plaintiff did not receive proper notice by providing a legal basis for summary judgment for this count. Pl.'s App. 117-118. Plaintiff's third count against Defendant in its Petition was one for money had and received based upon the fact that, *inter alia*, Defendant had charged a "broker fee" while acting as a correspondent lender. See Pl.'s App. A11-18(Pl.'s Class Action Petition).

Notwithstanding Plaintiff's Motion To Amend, Vacate, Correct Or Modify Judgment[5], the Appellate Court rejected this argument because it found that Plaintiff made this argument for the first time on appeal.

Lastly, the Appellate Court rejected Plaintiff's argument that the trial court had erred by denying Plainitff's Motion For Leave To Amend. Pl.'s App. 118-119. The Eastern District held that Plaintiff's Motion was untimely and would have prejudiced Defendant. Pl.'s App. 119. The Court also held that the amended pleadings would have been dismissed under the doctrine of abatement. Id.

On February 17, 2011, Plaintiff filed her Motion For Rehearing And Modification Or Transfer, Pl.'s App. 121-128, which was denied on March 10, 2011, Pl.'s App. 130. Plaintiff filed her Application For Transfer to the Supreme Court on March 23, 2011. Pl.'s App. 134-146. The Supreme Court granted Plaintiff's Motion For Transfer on April 26, 2011. Pl.'s App. 147.

[5] Plaintiff argued in that Motion "that Defendant's Motion never addressed Plaintiff's common law count for money had and received, and that Plaintiff was never afforded the opportunity to perform discovery with respect to that count." Pl.'s App. 109.

III. POINTS RELIED ON

A. The Appellate Court erred by ruling that the procurement provision of Section 484.010.2 "was not supported by the case law" because its ruling effectively nullified this provision of the statute and because the Supreme Court of Missouri has exclusive appellate jurisdiction over all cases involving the validity of a statute. Eisel v. Midwest BankCentre, 230 S.W.3d 335 (Mo. 2007); Hulse v. Criger, 247 S.W.2d 855 (Mo. banc 1952); Lopez v. Three Viers Elec. Co-op., Inc., 53 S.W.3d 117 (Mo.App. E.D. 1999); Mo. Const. art. 5, § 3.

B. The Trial Court's entry of summary judgment must be reversed because there are genuine issues of material fact that Defendant engaged in the unauthorized practice of law by procuring legal documents for a fee. VAMR 74.04(c).

1. The Appellate Court erred in determining the procurement provision of Section 484.010.2 was not supported by the case law because this definition of the law business has been cited with approval by this Court since 1934 and because this Court maintains that practice of law must be construed more broadly than merely drawing documents. In re First Escrow, Inc., 840 S.W.2d 839 (1992); VAMS 484.010.2.

2. The Trial Court's entry of summary judgment must be reversed because the procurement of documents in this case required legal knowledge, discretion and judgment reserved for the practice of law. Hulse v. Criger, 247 S.W.2d 855 (Mo. 1952); Uniform Residential Loan Application < https://www.efanniemae.com/sf/formsdocs/forms/1003.jsp>.

3. Entry of summary judgment must be reversed because a "separate fee" is not necessary to find a defendant liable for the unauthorized practice of law. Bray v. Brooks, 41 S.W.3d 7 (Mo.App.W.D. 2001).

4. The entry of summary judgment must be reversed because effectuating the procurement provision of Section 484.010.2 closes an important loophole in the definition of the practice of law and because it will not lead to absurd results. Janson v. LegalZoom.com, Inc., 271 F.R.D. 506 (W.D.Mo. 2010); VAMS 484.010.2; LSA-R.S. 37:212(A)(2)(b); Tenn.Code Ann. § 23-3-101(1); Ala.Code 1975 § 34-3-6(b)(2).

C. The Trial Court's entry of summary judgment must be reversed because preparing loan applications and assisting in drawing mortgage documents required Defendant to exercise legal judgment and discretion reserved for licensed attorneys. In re Ellingson, 230 B.R. 426 (Bkrtcy.D.Mont.,1999); In re Guttierez, 284 B.R. 287 (Bkrtcy.W.D.Tex. 2000); In re Bales, 2004 WL 3121308 (Bkrtcy.C.D.Ill. 2004); In re First Escrow, Inc., 840 S.W.2d 839 (Mo. 1992).

D. The Trial Court erred by granting summary judgment on Count III of Plaintiff's Petition when Defendant failed to provide a legal basis or statement of undisputed material facts in support of entry of judgment. Adams v. USAA Cas. Ins. Co., 2010 WL 1554405 (Mo.App. E.D. 2010); Premier Golf Missouri, LLC v. Staley Land Co., LLC, 282 S.W.3d 866 (Mo.App. W.D. 2009); Hanna v. Darr, 154 S.W.3d 2 (Mo.App.E.D. 2004); Wallingsford v. City of Maplewood, 287 S.W.3d 682 (Mo. 2009); VAMR 74.04(c)(1).

IV. STANDARDS OF REVIEW

The Supreme Court reviews two questions with this appeal: whether the Appellate Court exceeded its jurisdiction, and whether the Trial Court wrongly entered summary judgment. As to the first question, where the facts are uncontested, a question as to the subject-matter jurisdiction of a court is purely a question of law, which is reviewed *de novo*. Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10, 22 (Mo. banc 2003).

Second, the review of an order of summary judgment is *de novo*, and an appellate court need not defer to the trial court's grant of summary judgment. ITT Commercial Fin. v. Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo. banc.1993). Missouri courts regard summary judgment as an "extreme and drastic remedy" that must be applied with the exercise of "great care." Id. at 377. Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. Hill v. Ford Motor Co., 277 S.W.3d 659, 664 (Mo. banc 2009). See also VAMR 74.04(c)(" If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith."). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." ITT Commercial Fin., 854 S.W.2d at 376. Moreover, all evidence is reviewed in a light most favorable to the party against whom judgment was entered. Id. (citations omitted).

V. ARGUMENT

A. THE APPELLATE COURT OPINION MUST BE REVERSED BECAUSE IT EXCEEDED ITS JURISDICTION BY RULING THAT THE PROCUREMENT PROVISION OF SECTION 484.010.2 WAS NOT SUPPORTED BY THE CASE LAW.

The Supreme Court must overturn the decision of the Appellate Court because it exceeded its jurisdiction when it nullified the procurement provision of Section 484.010. Article 5, Section 3 of the Missouri Constitution provides:

> The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

Mo. Const. art. 5, § 3. Accordingly, "[w]hen an appellate court is without power to decide one of the issues on appeal because that issue seeks the determination of the validity of a statute, then the appeal is properly lodged in the Supreme Court, which is the only court having jurisdiction over all issues in the case." Lopez v. Three Viers Elec. Co-op., Inc., 53 S.W.3d 117, 120 (Mo.App. E.D. 1999)(transferred to the Supreme Court); St. John's Mercy Health System v. Division of Employment, 2008 WL 563424, *3(Mo.App. E.D. 2008)(unreported, transferred to the Supreme Court, 273 S.W.3d 510).

Moreover, questions of subject-matter jurisdiction are reviewed *de novo*. Mo. Soybean Ass'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10, 22 (Mo. banc 2003).

In this case, the Appellate Court invalidated the procurement provision of Section 484.010.2 by holding that it was inconsistent with the case law. The Missouri judiciary is the sole arbiter of what constitutes the practice of law. Eisel v. Midwest BankCentre, 230 S.W.3d 335, 338 (Mo. 2007); Hulse v. Criger, 247 S.W.2d 855, 857 (Mo. banc 1952). "Statutes may aid by providing machinery and criminal penalties but may not extend the privilege of practicing law to persons not admitted to practice by the judiciary." Eisel, 230 S.W.3d at 338. Accordingly, when the Appellate Court held that the procurement provision[6] of Section 484.010.2 "was not supported by the case law", it exceeded its jurisdiction by rendering that portion of the statute ineffective. Because the Appellate Court exceeded its jurisdiction by nullifying the procurement provision of Section 484.010.2, the appellate opinion in this case must be reversed.

[6] Section 484.010.2 provides in relevant part: "The 'law business' is hereby defined to be . . . the procuring of . . . for a valuable consideration of any paper, document or instrument affecting or relating to secular rights". V.A.M.S. § 484.010.2.

B. THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT MUST BE REVERSED BECAUSE THERE ARE GENUINE ISSUES OF FACT THAT DEFENDANT ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW BY PROCURING LEGAL DOCUMENTS FOR A FEE.

This Court must reverse the entry of summary judgment by the trial court because there are questions of material fact that Defendant engaged in the unauthorized practice of law by charging to procure documents related to a home loan. See VAMR 74.04(c)(Summary judgment is only appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith."). To begin with, this Court should reverse the Trial Court's entry of summary judgment because Section 484.010.2 is consistent with the Court's construction of the practice of law. Furthermore, the procurement of mortgage documents required a level of legal knowledge, discretion and judgment that constituted the practice of law. Additionally, a "separate fee" is not necessary to find a defendant liable of the unauthorized practice of law so long as the defendant varied its customary fee for a legal service. Lastly, liability for the procurement of legal documents closes an important loophole in the definition of the practice of law and will not lead to absurd results. The standard of review for entry of summary judgment is *de novo*. ITT Commercial Fin. v. Mid-Am. Marine, 854 S.W.2d 371, 377(Mo. banc.1993). For all the aforementioned reasons reasons, this Court must reverse the entry of judgment by the Trial Court.

1. The Appellate Court erred in determining the procurement provision of Section 484.010.2 was not supported by the case law because this definition of the law business has been cited with approval by this Court since 1934 and because this Court maintains that practice of law must be construed more broadly than merely drawing documents.

The Supreme Court should reverse the entry of summary judgment because Defendant engaged in the unauthorized practice of law by charging to procure legal documents. Section 484.010.2 provides:

> The "law business" is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

VAMS 484.010.2. This definition of the practice of law has been cited with approval by this Court since 1934, see State ex inf. Miller v. St. Louis Union Trust Co., 74 S.W.2d 348, 355 (Mo. 1934), and has been held to be "not inconsistent with this Court's cases defining the practice of law," Eisel v. Midwest BankCentre, 230 S.W.3d 335, 338 (Mo.,

2007). In In re First Escrow, Inc., 840 S.W.2d 839, 842 n. 5 (Mo. 1992), the majority of this Court distinguished Chief Justice Robertson's concurring opinion, maintaining that the procurement provision of Section 484.010 required a broader construction of the practice of law than merely drafting legal forms.

> Chief Justice Robertson's concurring opinion would hold that filling in the blanks in previously drafted legal forms is not the practice of law because it does not involve the "drawing" of legal documents. The statute, however, also encompasses "the procuring of or assisting in the drawing" of documents. § 484.010.2. These additional words mandate a broader reading.
>
> The crucial consequence of this distinction (whether respondents' activities are not the practice of law, or alternatively, are the authorized practice of law by a nonlawyer) is the Court's supervisory power. If filling in blanks on real estate documents does not constitute the practice of law, then *anyone* may do it, for *compensation*.

Id.(emphasis in original). In other words, the Supreme Court specifically acknowledged that the definition of the practice of law includes both procuring of legal documents and assisting in drawing legal documents. Because the Supreme Court has long recognized that the law business includes the procurement of documents, the Appellate Court erred in determining that this provision was not consistent with the case law, Pl.'s App. A116, and the judgment of the trial court must be overturned.

2. The trial court's entry of summary judgment must be reversed because the procurement of documents in this case required legal knowledge, discretion and judgment reserved for the practice of law.

Defendant engaged in the unauthorized practice of law by procuring legal documents because its actions required discretion and judgment. The determination of what constitutes the practice of law rests on whether legal skill, knowledge and any amount of discretion is required. In In re First Escrow, Inc., 840 S.W.2d 839, 848-9 (Mo. 1992)(emphasis added), this Court held:

> Escrow companies may not prepare or complete nonstandard or specialized documents such as contracts for deed, special warranty deeds, leases, lease-purchase agreements, easement agreements, well agreements, trustee deeds, wrap-around notes and deeds of trust, or any other document that requires the exercise of judgment or discretion.

This Court proceeded to distinguish between forms "requiring only ordinary intelligence rather than legal skills". Id. at 841. Similarly, in Hulse v. Criger, 247 S.W.2d 855, 863 (Mo. 1952)(emphasis added), this Court held:

> A real estate broker in conferring with parties to obtain facts and information about their personal and property status, other than is necessary to fill in the blank spaces in standardized forms necessary to complete and close transactions in which he is acting as a broker, for the purpose of

advising them of their rights and the action to be taken concerning them, is engaging in the practice of law.

See also Bray v. Brooks, 41 S.W.3d 7, 14 (Mo.App.W.D. 2001)(forms giving rise to liability under Section 484.020 "called for complex and sophisticated consideration of various legal issues"); State ex rel. McKittrick v. C. S. Dudley & Co., 340 S.W.2d 895, 899 (Mo. 1937)(the language of Section 484.010 gives rise to liability for "the doing of any act that requires legal knowledge."). In other words, key to the determination of whether or not an action constitutes the practice of law is the amount of legal skill, knowledge and discretion that is required. The Supreme Court of Missouri has attempted to maintain a "workable balance" between routine services and those that require legal discretion and advice. See In re Mid-America Living Trust Associates, Inc., 927 S.W.2d 855, 859 (Mo. 1996).

In this case, Defendant engaged in the unauthorized practice of law by procuring legal documents because its actions were not routine, but required discretion and judgment. Defendant was in the business of "matching them [borrowers] up with an investor to get a loan." Pl.'s App. A42. In order to match a client with a loan, Defendant would need to evaluate a client's assets and liabilities. See Uniform Residential Loan Application < https://www.efanniemae.com/sf/formsdocs/forms/1003.jsp>. See also e.g., U.S. v. Sanders, 343 F.3d 511, 528 (5th Cir. 2003)(J. Garza, concurring)("A bank loan officer hands the man a form, which requires the man to disclose his assets and liabilities."); In re Morris, 302 B.R. 728, 733 (Bkrtcy.N.D.Okla.,2003)("The loan applications included statements of the assets and liabilities of Morris and his wife.").

Next, Defendant would negotiate a loan with a lender. Pl.'s App. 43. Then, based upon the client's assets and liabilities, Defendant would "match" the client with a loan, Pl.'s App. A42, and advise her of her options, see e.g., Phillips v. Bowden, 949 S.W.2d 196, 198 (Mo.App.E.D. 1997)("[M]ortgage broker advised buyers that, based on buyers' qualifications, he did not see any problem in getting the loan."). Finally, Defendant would gather the documents for closing, including the note, mortgage and deed of trust, and charge a fee for this service. Pl.'s App. A22-23. See also Eisel v. Midwest BankCentre, 230 S.W.3d 335, 337 (Mo. 2007)(identifying the note and deed of trust as documents that give rise to liability for the unauthorized practice of law).

By negotiating a loan and matching a borrower with a lender, then charging for gathering and delivering the documents necessary to effectuate that loan, Defendant "advis[es its clients] of their rights and the action to be taken concerning them . . . engaging in the practice of law". See Hulse, 247 S.W.2d at 863. Matching a borrower with an investor necessarily required Defendant to advise Plaintiff of her available loan options, and Defendant invaded the province of attorneys by charging to procure the documents necessary to effectuate a loan. Matching a borrower with a loan based upon assets and liabilities requires legal knowledge and sophisticated consideration of legal issues. While Plaintiff takes no issue with Defendant's role in negotiating an interest rate and matching a borrower with an investor, Defendant engaged in the unauthorized practice of law as defined by Section 484.010.2 when it charged to procure the documents necessary to effectuate the loan it negotiated.

3. Entry of summary judgment must be reversed because a "separate fee" is not necessary to find a defendant liable for the unauthorized practice of law.

Notwithstanding the untimeliness of Defendant's "separate fee" argument, see Taggart v. Maryland Cas. Co., 242 S.W.3d 755, 760 (Mo.App. W.D. 2008), or the fact that Defendant charged a "Processing Fee" which had been deemed a separate fee for the unauthorized practice of law by the Missouri Judiciary, see Eisel v. Midwest BankCentre, 230 S.W.3d 335, 336 (Mo. 2007), the decision of the trial court must be reversed because no "separate fee" was necessary to give rise to Defendant's liability for the unauthorized practice of law. In Bray v. Brooks, 41 S.W.3d 7, 13 (Mo.App.W.D. 2001), the Missouri Appellate Court held: "We reject any claim by Bray that he was not engaged in the unauthorized practice of law as defined in § 484.010 simply because no separate charge was made for document preparation or legal advice." Rather, the Court stated that a Defendant may be liable for the unauthorized practice of law for any "valuable consideration" that was charged for the services listed in Section 484.010. Id. at 11-15. Accordingly, the admission of John Paci that charges for preparing mortgage documents were "lumped together" in its closing services charges was sufficient to give rise to Defendant's liability for the unauthorized practice of law. See Pl.'s App. A39-40.

However, the Bray Court explained that the civil penalties under Section 484.020 only apply when a defendant charges a separate fee or "var[ies] their customary charges" for legal services. The Western District explained:

> The Supreme Court implicitly recognized this middle ground in fashioning the injunctive relief in In re First Escrow, Inc., 840 S.W.2d 839, 849 (Mo.1992), to hold that the escrow company may not charge a separate document preparation fee "or vary their customary charges for closing based upon whether documents are to be prepared in the transaction."

Bray, 41 S.W.3d at 14. See also In re First Escrow, Inc., 840 S.W.2d 839, 849 (Mo.1992). In other words, the instant Defendant is liable for the civil penalties under Section 484.020 so long as it charged a separate fee or varied its customary charges for legal services. In this case, however, Plaintiff did not perform discovery on this issue because Defendant raised its "separate fee" argument for the first time in its Reply re Summary Judgment[7]. See Pl.'s App. A67-75. Accordingly, should the judgment of the trial court be reversed, Plaintiff asks the Court to remand this case with an instruction to perform discovery to determine whether civil penalties are appropriate under Section 484.020.

Lastly, this Court has repeatedly rejected defendants' arguments that a "separate fee" is necessary to give rise to liability for the unauthorized practice of law. In Carpenter v. Countrywide Home Loans, Inc., Appellant Countrywide argued that it

[7] Irrespective of the other charges that are subject to this appeal, Defendant did charge Plaintiff a "Processing Fee", Pl.'s App. A9, which was recognized by the Eisel Court as a fee for the unauthorized practice of law. See Eisel, 230 S.W.3d at 336.

charged certain closing fees "to recoup some of Countrywide's costs", and the fact "that a fee was charged for some of the work necessary to accomplish a single object of (making a loan or selling a boat) does not support a finding of liability." See Brief of Appellant Countrywide at 15, 60, Carpenter v. Countrywide Home Loans, Inc., No. SC 88367. Likewise, in Eisel v. Midwest BankCentre, Appellant Midwest BankCentre argued that its fees were charged "to recoup a portion of the costs it incurred in connection with the loans it made" including costs for computers and software. See Reply Brief of Appellant Midwest BankCentre at 3-4, Eisel v. Midwest BankCentre, No. SC 88167. In both of those cases, the Supreme Court rejected the defendants' arguments and found them liable for the unauthorized practice of law. See Eisel, 230 S.W.3d at 338-339; Carpenter v. Countrywide Home Loans, Inc., 250 S.W.3d 697, 699-702 (Mo. 2008). Plaintiff asks this Court to again reject these arguments and find Defendant liable so long as it "var[ied its] customary charges for closing". See In re First Escrow, Inc., 840 S.W.2d at 849. See also Order (July 20, 2009) at 7, Doc. 77, Rizzo v. Hendrick Automotive Group Corporation, Inc., No. 08-00137-CV-W-JTM(W.D.Mo.)("The clear implication of the [Eisel] court's reasoning is that the unauthorized practice of law statute is violated even if only a portion of a separate fee is devoted to 'law business'. Accordingly, the mere fact that [defendant]'s separate fee might have been used for various matters (some not related to the practice of law) is not determinative of whether the Missouri statute has been violated.").

4. The entry of summary judgment must be reversed because effectuating the procurement provision of Section 484.010.2 closes an important loophole in the definition of the practice of law and because it will not lead to absurd results.

The Supreme Court should reverse the Appellate Court's nullification of the procurement provision of Section 484.010.2 because it closes an important loophole in the definition of the practice of law, and because this provision will not lead to absurd results. In the absence of the procurement provision in Section 484.010.2, there is a large loophole in the definition of the practice of law in the State of Missouri: anyone can charge for the creation of legal documents by a non-attorney third party so long as the person charging the fee gathered but did not draft the documents. Non-attorneys can charge for legal documents that were drafted by other non-attorneys; in this case, Defendant can charge for legal documents prepared by a bank (U.S. Bank N.A.) or a document company (Document Systems), neither of which are licensed to practice law, or for a computer program that creates the legal documents (DocMagic). See Pl.'s App. A38. Moreover, companies such as LegalZoom.com, that makes millions of dollars by counseling Missouri citizens as to which legal documents they should create with their online program, will be able to avoid liability by claiming they charged for procuring legal documents while their clients filled-out the online forms. See e.g., Janson v. LegalZoom.com, Inc., 271 F.R.D. 506 (W.D.Mo. 2010). By affirming that the procurement provision of Section 484.010.2 is consistent with the Missouri judiciary's construction of the practice of law, this Court will "protect the public from being advised

or represented in legal matters by incompetent or unreliable persons". See Hulse v. Criger, 246 S.W.2d 855, 857-8 (Mo. 1952). Plaintiff asserts that this is why Louisiana, Tennessee and Alabama, like Missouri, define the practice of law to include the procurement of legal documents. See LSA-R.S. 37:212(A)(2)(b); Tenn.Code Ann. § 23-3-101(1); Ala.Code 1975 § 34-3-6(b)(2).

Moreover, endorsement of the procurement provision of Section 484.010.2 will not lead to absurd results. It will not morph the entire business of investing-in and brokering mortgages into the practice of law. See Pl.'s App. 116. Precluding correspondent lenders and mortgage brokers from charging to procure legal documents does not interfere with their charging origination fees and broker fees for all other services they provide. Also, it will not conflict with federal regulations that expressly allow for payment "to attorneys at law for services actually rendered". 12 U.S.C. 2607(c). Rather, by affirming the procurement provision of Section 484.010.2, the Supreme Court will only prohibit non-attorneys from charging to procure legal documents prepared by other non-attorneys.

C. THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT MUST BE REVERSED BECAUSE PREPARING LOAN APPLICATIONS AND ASSISTING IN DRAWING MORTGAGE DOCUMENTS REQUIRED DEFENDANT TO EXERCISE LEGAL JUDGMENT AND DISCRETION RESERVED FOR LICENSED ATTORNEYS.

Defendant engaged in the unauthorized practice of law by charging to prepare and assist in preparing legal documents. To begin with, Defendant engaged in the unauthorized practice of law by charging to prepare Plaintiff's loan application. See Pl.'s App. at A38(Mr. Paci admitting that Defendant charged to prepare the loan application). In determining whether the preparation of a document constituted the unauthorized practice of law, "the key issue is content, not form." Pl.'s App. 115 (citing Hulse v. Criger, 247 S.W.2d 855, 859 (Mo. banc 1952)). Missouri Courts have held that preparing documents that require "the exercise of judgment or discretion", "called for complex and sophisticated consideration of various legal issues", or otherwise "require[] legal knowledge" represents the unauthorized practice of law. In re First Escrow, Inc., 840 S.W.2d at 848-9; Bray, 41 S.W.3d at 14; State ex rel. McKittrick, 340 S.W.2d at 899. In this case, Defendant engaged in the unauthorized practice of law by charging to prepare Plaintiff's loan application.

First, Defendant engaged in the unauthorized practice of law by charging to prepare Plaintiff's loan application because preparation of her statement of assets and liabilities required considerable legal knowledge and discretion. As previously explained, Uniform Residential Loan Applications require applicants to make a statement

of their assets and liabilities. See Uniform Residential Loan Application < https://www.efanniemae.com/sf/formsdocs/forms/1003.jsp>. See also e.g., U.S. v. Sanders, 343 F.3d 511, 528 (5th Cir. 2003)(J. Garza, concurring)("A bank loan officer hands the man a form, which requires the man to disclose his assets and liabilities."); In re Morris, 302 B.R. 728, 733 (Bkrtcy.N.D.Okla.,2003)(" The loan applications included statements of the assets and liabilities of Morris and his wife."). While this case presents an issue of first impression of whether preparation of a statement of assets and liabilities in a loan application represents the unauthorized practice of law, courts have consistently held that preparation of a substantively identical statement in the context of a bankruptcy proceeding represents the practice of law.

In In re Ellingson, 230 B.R. 426 (Bkrtcy.D.Mont.,1999), the Federal District Court for the District of Montana concluded that preparation of a statement of assets and liabilities represented the unauthorized practice of law. This lawsuit was one brought by various debtors against Connie Monroe, who acted as a "bankruptcy petition preparer", engaging in the unauthorized practice of law "by preparing the petitions, Schedules and Statements herself and scheduling assets, liabilities and exemptions according to her own determinations rather than her clients". Id. at 431. At issue in that case was "Exhibit 8 is the 'Client Questionnaire; given to Ellingson by Monroe. Exhibit 8 is a printed form calling for information about the debtor's assets, liabilities, income and expenses and other matters." Id. at 428. The Ellingson court began its discussion by noting: "Montana follows the majority view that preparation or filling in of blanks on preprinted forms constitutes the practice of law." Id. at 433. The Court continued by citing Monroe v.

Horwitch, 820 F.Supp. 682, 687 (D.Conn. 1993), *aff'd*, 19 F.3d 9 (1994)(*citing* State v. Buyers Service, Co., 357 S.E.2d 15, 17 (S.C. 1987)), stating:

> What constitutes "preparation" of "legal documents" is construed broadly. "Preparation of instruments, even with preprinted forms, involves more than a mere scrivener's duties" and, therefore, constitutes the practice of law.

The Ellingson Court held that Ms. Monroe engaged in the unauthorized practice of law by, *inter alia*, determining "where property and debts were to be scheduled" because this task "require[d] the exercise of legal judgment beyond the capacity and knowledge of lay persons". The Court concluded: "By soliciting information in Exhibit 8 and preparing Schedules and Statements on her computer, Monroe rendered legal advice and therefore engaged in the unauthorized practice of law." See also In re Guttierez, 284 B.R. 287, 296 & 299 (Bkrtcy.W.D.Tex. 2000)(Preparation of bankruptcy documents that require a preparer to know "how to classify assets and liabilities", requiring the preparer to have knowledge of state property law and make choices for the debtor, constituted the unauthorized practice of law); Matter of Sands, 22 B.R. 132, 135 (Bkrtcy.N.J. 1982)(Defendant engaged in the unauthorized practice of law by reviewing with the petitioners their assets and liabilities); Segall v. Berkson, 139 Ill.App.3d 325, 330 (4th Dist. 1985)(attorney committed malpractice by failing to determine the extent of his client's assets and liabilities).

Likewise, Defendant's charging to prepare of a statement of assets and liabilities with respect to Plaintiff's loan application constituted the unauthorized practice of law

because it required complex and sophisticated consideration of various legal issues. See Bray, 41 S.W.3d at 14. Defendant needed to consider Plaintiff's credit card balances and other debts when preparing her statement of assets and liabilities. See Pl.'s App. 9(listing Plaintiff's debts). Additionally, Defendant needed to classify other assets and liabilities such as insurance, child support, child care, rent and alimony. See In re Bales, 2004 WL 3121308, *2(Bkrtcy.C.D.Ill. 2004)(loan application liabilities included insurance, child support and child care); In re Homer, 168 B.R. 790 (Bkrtcy.N.D.Ga 1994)(liabilities on loan application included rent and child support); Schade v. Schade, 2007 WL 2570357, *2 (Conn.Super. 2007)(liabilities on loan application should have included alimony and child support). Consideration and classification of these debts and assets required knowledge of both property law and family law. Because preparation of Plaintiff's loan application required a complex consideration of various legal issues related to her assets and liabilities, Defendant engaged in the unauthorized practice of law by charging to prepare her Uniform Residential Loan Application.

Equally, Defendant engaged in the unauthorized practice of law by charging to assist in drawing of Plaintiff's mortgage documents. In this case, Defendant charged for gathering information, Pl.'s App. A19-20, that assisted the investor and other third parties in preparing closing documents, Pl.'s App. A38. The documents that the investor and other third parties prepared, including the note and deed of trust, Pl.'s App. A22-23, have been determined by this Court to be the type of documents that give rise to liability for the unauthorized practice of law, In re First Escrow, Inc., 840 S.W.2d 839, 848-9 (Mo. 1992). While "[m]erely gathering information for use in a legal document does not

necessarily constitute the unauthorized practice of law", In re Mid-America Living Trust Associates, Inc., 927 S.W.2d 855, 865 (Mo. 1996), Defendant exercised considerable discretion and judgment in evaluating Plaintiff's assets and liabilities, negotiating with investors and matching her with a loan. See Section IV(B)(2) of this Substitute Brief(incorporated herein by reference). Moreover, this Court has recognized the inclusion of "assisting in the drawing" of legal documents in the definition of the practice of law in Section 484.010.2 mandates a broader application of the statute beyond merely drawing documents. In re First Escrow, Inc., 840 S.W.2d 839, 842 n. 5 (1992). Because Defendant engaged in the unauthorized practice of law by assisting third parties to draw the note and deed of trust for consideration, the judgment of the trial court must be overturned.

D. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON COUNT III OF PLAINTIFF'S PETITION WHEN DEFENDANT FAILED TO PROVIDE A LEGAL BASIS OR STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ENTRY OF JUDGMENT.

Summary Judgment on Count III of Plaintiff's Petition must be reversed because, in violation of Rule 74.04(c)(1), Defendant provided neither a legal basis for dismissal or a statement of uncontroverted material facts. "Summary judgment borders on a denial of due process; therefore, strict compliance with the rule's requirements is necessary to prevent summary judgment proceedings 'from crossing over the border.'" Adams v. USAA Cas. Ins. Co., 2010 WL 1554405, *7(Mo.App. E.D. 2010). See also Premier Golf Missouri, LLC v. Staley Land Co., LLC, 282 S.W.3d 866, 872 (Mo.App. W.D. 2009)("Generally, failure to comply with Rule 74.04(c)(1) warrants a trial court's denial of a summary judgment motion and warrants an appellate court's reversal of the grant of summary judgment."). Non-compliance is not a matter subject to waiver by a party and may be raised *sua sponte* by an appellate court. Hanna v. Darr, 154 S.W.3d 2, 5 (Mo.App.E.D. 2004). Rule 74.04(c)(1) provides: "A motion for summary judgment shall summarily state the legal basis for the motion." It further requires that a movant submit a statement of uncontroverted material facts that are attached to the motion. VAMR 74.04(c)(1). In Adams, the Missouri Appellate Court held:

> Rule 74.04(c) requires summary judgment movants not only to state summarily the legal basis for their motion and file a legal memorandum

explaining why summary judgment should be granted, but also to submit a statement of uncontroverted material facts.

Id. The Adams Court proceeded to reverse the trial court's entry of summary judgment for its failure to comply with the strict requirements of Rule 74.04(c). Id. In the case at hand, Defendant failed to comply with the requirements of Rule 74.04(c)(1) in two different manners: 1) Defendant failed to provide a legal basis for dismissal of Count III; and, 2) Defendant failed to provide a statement of uncontroverted material facts with respect to Count III. Accordingly, the judgment of the trial court must be reversed.

To begin with, Defendant provided no legal basis for dismissal of Count III. In its Motion for Summary Judgment and incorporated Memorandum, Pl.'s App. A19-20, A24-26, Defendant exclusively addressed Plaintiff's unauthorized practice of law claims, and did not mention her claim under the theory of money had and received. Defendant only mentioned Count III in its request for relief. Pl.'s App. A25("Therefore, JLB is entitled to summary judgment on Counts I, II and III of Plaintiff's Petition."). Nowhere in her brief did she provide any legal grounds for judgment on Plaintiff's claim under the Missouri common law theory of money had and received. Because Defendant failed to comply with the Rule 74.04(c)(1) requirement that a movant provide a "legal basis for the motion," the trial court's entry of summary judgment must be reversed.

Moreover, Defendant failed to file a statement of undisputed material facts with respect to Count III. All four paragraphs in Defendant's Statement of Undisputed Facts addressed Plaintiff's unauthorized practice of law claims.

1. JLB did not charge a fee for preparation of any legal documents. (Paci Affidavit ¶2).

2. JLB did not draft nor prepare any legal documents for Plaintiff. (Paci Affidavit ¶2).

3. The "processing fee" and "administrative fee" were charged for tasks associated with processing the loan which included gathering forms and documents, communications with the underwriter, and obtaining additional information when required by the underwriter. (Paci Affidavit

4. JLB did not draft or prepare any legal documents for Plaintiff. (Paci Affidavit ¶3).

Pl.'s App. A65(JLB's Statement Of Undisputed Facts). None of these purported facts address the elements of Plaintiff's common law claim for money had and received, or Plaintiff's allegation that "Defendant has received monies which is equity and good conscience ought to be paid to Plaintiff." Pl. App. A17. Accordingly, Defendant failed to comply with the Rule 74.04(c)(1) requirement that that a movant must provide a statement of undisputed material facts with respect to Count III of Plaintiff's Petition, and the judgment of the trial court must be reversed. Adams v. USAA Cas. Ins. Co., 2010 WL 1554405, *7(Mo.App. E.D. 2010)(reversing trial court's grant of summary judgment for failure to provide a statement of uncontroverted material facts); Wallingsford v. City of Maplewood, 287 S.W.3d 682, 687 (Mo. 2009)(same).

Lastly, this Court should note that Plaintiff did not raise this argument for the first time on appeal. See Pl.'s App. A118. In her Motion To Amend, Vacate, Correct Or

Modify Judgment, Plaintiff argued "that Defendant's Motion never addressed Plaintiff's common law count for money had and received, and that Plaintiff was never afforded the opportunity to perform discovery with respect to that count." Pl.'s App. 109. Plaintiff made it clear in that motion that she was unsure whether the Court's entry of judgment was directed at all Plaintiff's claims or only those claims that concerned the unauthorized practice of law. Moreover, Plaintiff did not provide any argument in opposition entry of summary judgment on Count III because she never received notice of any legal basis for judgment. In this case, Plaintiff should be allowed to seek recovery for "broker fees" in all instances in which Defendant acted as a correspondent lender and not as a broker. See Pl.'s App. A11-18(Pl.'s Class Action Petition). Accordingly, even if the Supreme Court determines that Defendant did not engaged in the unauthorized practice of law, the Court should reverse the Trial Court's judgment with respect to Count III of her Petition.

VI. CONCLUSION

For all of the aforementioned reasons, Plaintiff prays that this Court:

1) Reverses the trial court's entry of summary judgment with respect to Plaintiff's unauthorized practice of law and Merchandising Practices Act claims (Counts I & II);

2) Reverses the trial court's entry of summary judgment with respect to Plaintiff's common law claim for money had and received (Count III); and,

3) Taxes Defendant for the costs of these appeals. VAMR 77.01; City of Poplar Bluff v. Knox, 410 S.W.2d 100, 104 (Mo.App. 1966).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Christian G. Montroy, hereby certify to the following. The attached substitute brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). The substitute brief was completed using Microsoft Word, which is no smaller than Times New Roman 13 point. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 10,000 words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

The CD/diskette filed with this substitute brief contains a complete copy of this brief. It has been scanned and is free of viruses.

Two true and correct copies of the attached substitute brief and a CD/diskette containing a copy of this substitute brief were mailed, postage prepaid this 7th day of July, 2011, to Robert Schultz/Ronald J. Eisenberg, SCHULTZ & ASSOCIATES LLP, 640 Cepi Drive, Suite A, Chesterfield, MO 63005.

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