

IN THE SUPREME COURT OF MISSOURI

CASE NO. SC88167

**CLARK E. EISEL and PATRICIA S. EISEL, et al.,
individually and on behalf of all others similarly situated**

Plaintiffs/Respondents

vs.

MIDWEST BANKCENTRE

Defendant/Appellant,

**On Appeal from the Circuit Court of St. Louis County, Missouri
Honorable Mark D. Seigel**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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REPLY TO THE EISELS' "FACTUAL RESPONSE"

The Eisels open their Substitute Brief with a "Factual Response" which begins with a complaint that certain of the *amici* have improperly referred to matters outside the record on appeal. Eisels' Brief, pp.9-10. Apparently, the Eisels' complaint is tongue-in-cheek, for notwithstanding their protests, they then gratuitously offer their own extra-record information concerning a purported "pre-suit investigation" by their counsel, which they claim revealed that "a majority of Missouri mortgage lenders did not charge document preparation fees." Eisels' Brief, p.11. Obviously, this statement has no proper place in the Eisels' Substitute Brief. Indeed, the Eisels as much as concede this, acknowledging that this so-called "pre-suit investigation" "is also not part of the record". Id. Moreover, the accuracy of the statement is questionable. It is belied by the fact that the Missouri Bankers Association has seen fit to file an *amicus* brief, arguing for a reversal of the trial court's judgment, on behalf of its members "representing over 1,800 banking locations and over 30,000 bank employees in the State of Missouri." Missouri Bankers *Amicus* Brief, p.4. The Eisels' self-serving, factually questionable and admittedly improper statement should be disregarded.

The Eisels next assail Midwest's honesty and transparency "in charging and disclosing document preparation fees". Eisels' Brief, pp.11-14. Their attack, however, turns a blind eye to the stipulated facts in this case: before each mortgage closing, each Plaintiff Class member received from, executed and returned to Midwest a Good Faith Estimate, which expressly identified the document preparation fee being charged by Midwest, and at each mortgage closing, each Plaintiff Class member executed and

delivered to Midwest a HUD-1 Settlement Statement, which again expressly identified the document preparation fee being charged. L.F.Vol. III, p.372, ¶¶35-36. Thus, the Eisels and every other Plaintiff Class member were explicitly notified in writing, not once, but twice, regarding the document preparation fee. Midwest was open, honest and transparent about the fact that it was charging its borrowers a document preparation fee. The Eisels' unfounded assault is all the more egregious because the evidence demonstrating that Midwest was open and forthright with its borrowers was described in detail in the Statement of Facts contained in Midwest's Substitute Brief, *see* Midwest Brief, pp.17-18, which the Eisels have acknowledged "is accurate and complies with Rule 84.04(c)." Eisels' Brief, p.9.

In the face of these facts, the Eisels cast their "transparency" argument not as a failure by Midwest to notify its borrowers of the document preparation fee, but, rather, as a purported "mislabeling" by Midwest of that fee. The gist of the Eisels' argument is that by including in its calculation of the document preparation fee the overhead costs of its loan processing department, *i.e.*, the costs of computers and computer software used by clerical employees of the department to complete forms at issue in this case, the paper on which completed forms were printed, the chairs and desks at which clerical employees sat as they filled in blanks in the forms, and the salaries and benefits of the clerical employees who filled in those blanks, Midwest "misabeled" that document preparation fee. Eisels' Brief, p.12. This is so, according to the Eisels, because a HUD pamphlet describes a "Document Preparation" fee as "a separate fee that some lenders charge to cover their costs of preparation of final legal papers, such as a mortgage, deed of trust,

note or deed.” Id. Implicitly, the Eisels would redefine and limit a permissible document preparation fee to a charge only for the cost of the physical act of filling in the blanks in the form documents at issue. There is no authority for this restrictive definition, and the Eisels offer none.

Simply put, the Eisels’ definition of “document preparation fee” is absurdly narrow and commercially unrealistic. The physical act of completing the forms at issue must be performed by employees who receive salaries and benefits for their work. Those employees must have offices in which to complete the forms and computers loaded with the software necessary to generate and complete the forms. Those computers must be situated on the desks at which the employees work – and so forth. Each of the foregoing is a contributing component to the completion of the forms, and each has a cost associated with it attributable to the completion of those forms. Hence, each of those component costs, when aggregated, constitute Midwest’s “costs of preparation” of the forms at issue. Consequently, Midwest did not mislabel its document preparation fee.

If anyone is guilty of mislabeling, it is the Eisels. They make a free leap from their own self-serving definition of what constitutes a permissible document preparation fee to the bald assertion that Midwest charged its borrowers this fee “as a separate profit item.” Eisels’ Brief, p.13. However, the record is clear and unequivocal: Midwest did not make a profit charging its borrowers a document preparation fee. Midwest merely tried to recoup a portion of the costs it incurred in connection with the loans it made. Dunlap Depo2/25/03, pp.22-23; Dunlap Depo7/21/05, pp.26-27, Midwest Brief, p.17. Midwest charged a document preparation fee of \$125.00. Dunlap Depo2/25/03, p.36.

But several years before this lawsuit was filed, Midwest did a cost study which revealed that it cost Midwest about \$185.00 to process one mortgage loan. Dunlap Depo2/25/03, pp.23,72. Thus, Midwest's document preparation fee covered only about two-thirds of the costs Midwest incurred in connection with a loan. The fee did not even cover Midwest's costs; hence, it was not "a separate profit item".

I.

THE PROCEDURAL POSTURE AND CRITICAL SIGNIFICANCE OF MIDWEST’S CONSTITUTIONAL CHALLENGE TO §484.020 PRESENTS A COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION UNDER RULE 84.13(c) TO CONSIDER THE TRIAL COURT’S ERRONEOUS RULING ON THE MERITS OF THIS CONSTITUTIONAL CHALLENGE AS PLAIN ERROR.

Admittedly, Midwest did not raise its constitutional challenge to §484.020 until it filed its Motion for New Trial. Hence, Midwest asked the trial court and now asks this Court to hear that challenge under the auspices of the plain error rule. In response, the Eisels pejoratively label Midwest’s constitutional challenge an “afterthought”, and argue this Court is foreclosed from considering the issue by the general rule that constitutional questions regarding a statute must be raised at the first opportunity. Eisels’ Brief, p.14. The reason for this rule is to prevent “surprise” and to “permit the trial court an opportunity to fairly identify and rule on the issues.” State ex rel. Tompras v. Board of Election Commissioners of St. Louis County, 136 S.W.3d 65,66 (Mo.banc 2004). Here, the Eisels have not claimed surprise, and the trial court ruled on Midwest’s constitutional challenge in its Order and Judgment denying Midwest’s Motion for New Trial. L.F.Vol. IV, p.491; Appendix, A21. Accordingly, the rationale for applying the general rule is vitiated.

The Eisels also note that when Midwest initially filed its appeal with this Court on the basis that its constitutional challenge brought the appeal within the Court’s exclusive

jurisdiction, this Court granted the Eisels' Motion to Transfer for Lack of Exclusive Jurisdiction, transferring the appeal to the Appellate Court. From this procedural history, the Eisels infer that this Court has already considered and found Midwest's constitutional challenge to be "insubstantial and only merely colorable." Eisels' Brief, p.16. This is wishful speculation. Nothing in the two sentence transfer Order suggests this Court has already reached any conclusion concerning the merits of Midwest's constitutional challenge. On the contrary, if anything may be inferred from the transfer Order, it is that this Court was merely following precedent, which holds that when a constitutional challenge has not been properly preserved for review, jurisdiction is in the Court of Appeals rather than in the Supreme Court. Sharp v. Curators of the University of Missouri, 138 S.W.3d 735,738 (Mo.App.E.D. 2003).

The Eisels further argue this Court should not hear Midwest's constitutional challenge under the plain error rule because it "is not in the same league" as those cases where courts exercised discretion to consider a belatedly raised constitutional challenge. Eisels' Brief, p.20. In support of this judgmental assessment, the Eisels argue Midwest's constitutional challenge "only involves money", whereas those cases in which the appellate courts engaged in discretionary plain error review of constitutional challenges involved rights that were "substantial". Id.

While it is true the judgment giving rise to this appeal is a monetary one, it is far from true that Midwest's constitutional challenge "only involves money." Midwest contends that the deficiency of \$484,020, under which that monetary judgment was rendered, has deprived Midwest of its property without due process of law in violation of

the Fourteenth Amendment to the U.S. Constitution. The due process of law guaranteed by the Fourteenth Amendment is a fundamental right, and, to say the least, Midwest's challenge based upon the deprivation of that right is significant. Indeed, Midwest's due process challenge has significance equal with, if not more than, the constitutional challenges asserted in the cases characterized by the Eisels for reasons that go beyond the constitutional challenge itself, but which amplify its importance. For example, this is the first time anyone has raised a constitutional challenge to §484.020 which purports to regulate the critical relationship between the legal profession and the general public. Moreover, the legal file in this case as well as the Motions to Intervene in this appeal reflect that this case is just one of several with identical issues pending, showing a broad-based attack on the essential operation of lending banks in Missouri. These banks ensure the existence of a financial base for the housing industry vital to a viable community and economy.

The Eisels mock Midwest's assertion that its constitutional *challenge* is more significant because it is one of first impression by mischaracterizing its argument as inconsistently asserting that Midwest's due process *rights* are more significant. However, it is the Eisels who misperceive the true nature of the rights protected by the U.S. Constitution. It is a basic truth that the Constitution does not prioritize or rank fundamental rights. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617,628 (1989) ("there is no such distinction between, or hierarchy among, constitutional rights") (rejecting priority of Sixth Amendment or First Amendment over other constitutional rights); Valley Forge Christian College v. Americans United for Separation of Church

and State, Inc., 454 U.S. 464,484 (1982) (“Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary “sliding scale” of standing which might permit respondents to invoke the judicial power of the United States”) (rejecting argument that Establishment Clause was more “fundamental” than Incompatibility and Accounts Clauses).

Conceding that Midwest’s cases do demonstrate that this Court has the authority and discretion to review the constitutionality of §484.020, the Eisels then assert that the case law does not “require” the Court to do so. Eisels’ Brief, p.19. Midwest acknowledges that the exercise of plain error review is a matter of this Court’s discretion, and has never suggested otherwise. Midwest has presented compelling reasons for the Court to exercise its discretion. Section 484.020 is not simply a prosaic or usual statute defining and regulating legal relations. It is of critical interest to the public generally and the legal profession’s standing and relationship to the public. This statute strikes at the very heart of this Court’s authority to regulate the relationship between the bar and the general public and, if misconstrued and misapplied, would do serious damage to that relationship. As the final arbiter of what constitutes the unauthorized practice of law, this Court has a unique interest in and relationship to this statute. It implicates the Court’s duty to protect the public from the unauthorized practice of law and to decide what commercial activities non-lawyers may properly engage in without restriction for public convenience.

Unquestionably, then, the procedural posture and critical significance of Midwest’s constitutional challenge presents a compelling, if not unassailable, reason for

this Court to use its authority and exercise its discretion under Rule 84.13(c) to consider the trial court's erroneous ruling on the merits of this constitutional challenge as plain error.

II.

LACKING A CULPABLE MENTAL STATE AS A PREREQUISITE TO AN AWARD OF THE TREBLE DAMAGE PENALTY MANDATORILY IMPOSED BY §484.020, THE STATUTE REQUIRES NEITHER THE ESSENTIAL CONDUCT OR STANDARD FOR THE IMPOSITION OF THAT PENALTY, AND, THUS, THE STATUTE VIOLATES DUE PROCESS.

The Eisels label Midwest's analysis of the subject statute, §484.020, "irrelevant". Eisels' Brief, p.23. With that dismissive characterization, they proceed to redefine the issue before the Court to reach their pre-conceived conclusion that §484.020 passes constitutional muster. Their argument is specious. Not only is Midwest's analysis relevant, it is essential to the resolution of Midwest's constitutional challenge to the statute, which demonstrates that a culpable mental state is a prerequisite to the imposition of penal damages. Midwest's Brief, pp.39-42. Section 484.020, which mandatorily imposes treble damages that are admittedly penal and are synonymous with or equivalent to punitive damages upon a violator without any evidence or even the ability to consider any evidence demonstrating the violator's culpable mental state, deprives the violator of property without due process in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Instead of addressing this issue, the Eisels summarize several decisions from Missouri courts awarding double and treble damages without evidence of the defendant's culpable mental state. Eisels' Brief, pp.24-28. However, none of the defendants in those cases raised a constitutional challenge to the multiple damages provisions of the statutes

involved, and, understandably, none of the courts in those cases *sua sponte* considered the constitutionality of those statutes.

The Eisels also rely upon three other cases decided under the Texas Deceptive Trade Practices Act. Eisels' Brief, pp.14-16. That statute makes unlawful various anti-consumer activities and enables a consumer to recover treble damages. In each case, the defendant was sued for unintentional violations of the statute and the court upheld the treble damages provision. However, the basis of the constitutional challenge in those cases was distinctly and significantly different from Midwest's challenge. In each case, the defendant contended that the statute was "unconstitutionally vague". See Pennington v. Singleton, 606 S.W.2d 682,689 (Tex. 1980).

Midwest's challenge to §484.020 is *not* that the treble damages provision is unconstitutionally vague; rather, §484.020 is unconstitutional because it mandatorily imposes a penalty equivalent to punitive damages without any determination as to whether the alleged violator had a culpable mental state. Due process safeguards require such a determination before any such penalty can be imposed. Thus, the Texas cases cited by the Eisels are irrelevant.

Contrary to the Eisels' contention, Midwest never suggested that the holding of Haslip addresses treble damages. The Eisels seek to avoid the irrefutable logic of Midwest's argument. Eisels' Brief, p.33. Rather, Haslip establishes that the imposition of punitive damages without adequate safeguards is unconstitutional. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1,18-22 (1991). In this case, the treble damages are the equivalent of punitive damages. The teaching of Haslip, for which it was cited, is

applicable, *i.e.*, due process demands certain procedural protections because of the nature of punitive damages, and in this case penalties, and to prevent an award that is arbitrary. Midwest's Brief, p.43.

III.

MIDWEST’S ADMITTEDLY PERMISSIBLE CONDUCT OF COMPLETING THE STANDARDIZED LOAN DOCUMENTS AT ISSUE WAS AN INTEGRAL AND ESSENTIAL PART OF ITS BUSINESS AS A MORTGAGE LENDER; THEREFORE, ITS CHARGING A SEPARATE FEE FOR THAT ACTIVITY DID NOT TRANSMOGRIFY ITS CONDUCT INTO UNLAWFUL LAW BUSINESS.

The Eisels argue that this case is *controlled* by §§484.010 and 484.020. Eisels’ Brief, p.34. They contend that these statutes effectively trump the Court’s authority to define and regulate the practice of law. This Court set out an analytical approach to determining whether the conduct at issue constitutes the unauthorized practice of law or unlawful law business in Hulse v. Criger, 247 S.W.2d 855 (Mo.banc 1952), and In re First Escrow, 840 S.W.2d 839 (Mo.banc 1992). The Eisels ignore this Court’s reasoned approach and insist on an overly-rigid reading of these statutes. In doing so, they confuse the General Assembly’s authority to impose penalties for the unauthorized practice of law with the authority to define it.

This Court is not limited in its regulation of the practice of law to injunctive relief or bar disciplinary actions, as the Eisels suggest. Eisels’ Brief, p.39. Rather, this Court has repeatedly stated that it is the final arbiter of what constitutes the practice of law. The Eisels cite Hoffmeister v. Tod, 349 S.W.2d 5, 11 (Mo.banc 1961) for the proposition that in a criminal prosecution, the General Assembly can define the practice of law however it sees fit, in disregard of this Court’s inherent authority. Eisels’ Brief, p.38. This flawed interpretation overlooks critical language in Hoffmeister which makes it clear that the

General Assembly’s authority is always subject to the Court’s: “We have generally recognized that the legislature may, in the exercise of the police power, aid the court by providing penalties for unauthorized practice and for that purpose may define the practice of law, *but that it may in no way hinder, interfere with or frustrate the court’s inherent power.*” Id. at 11 (emphasis added). Indeed, the Court expressly and unequivocally declared in First Escrow that the General Assembly “may only *assist* the judiciary by providing penalties for the unauthorized practice of law, *the ultimate definition of which is always within the province of this Court.*” First Escrow, at 843 n.7 (emphasis added).

Thus, the definition of the practice of law itself is not part of the General Assembly’s “police power”, and to claim as much undermines the Court’s declared inherent power to provide the ultimate definition. The Eisels’ redefinition of the powers of the legislature to include the declaration of the conduct that constitutes the unlawful practice of law and assertion that any action under the statute constitutes a “prosecution”¹ falling under legislative police powers would lead to chaos. Conceivably, the General Assembly could define the practice of law differently than the Court and criminalize

¹ Moreover, the Eisels insist that *all* actions taken under the statute are tantamount to criminal prosecutions pursuant to the State’s police power, but they admit that the statute punishes conduct without requiring a culpable mental state. However, due process prohibits the punishment of a crime without any element of intent. The force of the Eisels’ own logic, however suspect, demonstrates the inherent unconstitutionality of the statute under the Fourteenth Amendment.

conduct that this Court does not consider unauthorized. For example, a statute making it a misdemeanor to represent oneself in court would conflict with this Court's determination that self-representation is permissible.

Under the factorial approach set out in Hulse, Midwest's conduct in this case does not constitute unauthorized law business, notwithstanding the Eisels' statutory argument to the contrary. This Court's authority to define and regulate the practice of law necessarily precedes and supersedes the General Assembly's "police power" to establish penalties in aid of such authority. This Court should not acquiesce in the usurpation of its inherent authority in contravention of its constitutional powers.

By insisting on the primacy of the statutes, the Eisels' central premise with respect to the holdings of Hulse and First Escrow is that *anytime* any non-lawyer such as Midwest charges a separate fee for completing standardized documents, that conduct violates those statutes. However, neither in Hulse nor First Escrow did the Court lay down the unyielding rule suggested by the Eisels. On the contrary, the Court established in Hulse, and reiterated in First Escrow, a factorial analysis for determining whether one is unlawfully doing law business. Hulse at 862; First Escrow at 843. The Court refrained from saying the charging of a separate fee, or any of the other enumerated factors, is singularly determinative. Yet that is precisely what the Eisels suggest.

Midwest is neither a real estate broker nor an escrow company. The holdings quoted by the Eisels from Hulse and First Escrow are merely the Court's application of its factorial analysis to those businesses, not mortgage lenders like Midwest. Midwest's Brief, pp.57-59. The holdings of Hulse and First Escrow are instructive only to the extent

they demonstrate the proper application. The methodology they provide demonstrates that Midwest's conduct manifestly does *not* constitute a violation of the statute. In fact, the Eisels completely ignore Midwest's detailed application of the factors to its own business because they wish to ignore the ineluctable conclusion to be drawn from it. The Eisels do not – and cannot – show that the factorial analysis compels any different conclusion.

Hence, the Eisels cling to insistence that the statute provides that charging a fee is a *per se* violation. However, this would render the Court's factorial analysis superfluous, and suggest that the Court wasted its time in Hulse and First Escrow.

In applying the factors in the context of the banking industry, Midwest demonstrated that its conduct in the present case, is not merely a difference in degree from the broker's conduct in Hulse; it is a complete difference in kind. Midwest's Brief, pp.52-56. The broker's business in Hulse was not conveyancing; his business was bringing a buyer and seller together, for which he received a commission. Contrariwise, here, documenting mortgage loans is an integral and essential part of Midwest's business – not a separate business. Therefore, Midwest's charging of a fee to recoup some of its costs associated with documenting those loans does not place an “emphasis upon conveyancing as a practice of law” instead of Midwest's activities as a lender. The present case is, thus, clearly distinguishable from Hulse and First Escrow, and the conclusion in Hulse, implicitly accepted in First Escrow, cannot be applied sensibly here.

The Eisels necessarily disregard Midwest's application of the Hulse factors and instead resort to two footnotes in First Escrow upon which they place their own strained

interpretation. They extract a quote from footnote 7: “Both Hulse and our opinion today bar service providers from charging a fee for preparing legal documents....” Then they baldly assert that in footnote 10 “[s]ervice providers’ was defined to include ‘brokers, title companies and *lenders*.’” Eisels’ Brief, p.43. That assertion is a free leap to a pre-conceived conclusion. Nothing in footnote 10 says that the Court was adopting “brokers, title companies and lenders” as the definition of the phrase “service providers”. Footnote 10 is nothing more than a survey of what other courts, as of the date of that decision,² had concluded regarding what functions various types of businesses could perform in settling real estate transactions. The Eisels later state that the Court “explained” in this footnote, “[b]anks...may fill in the blanks of standardized real estate forms related to mortgage loans, so long as they do not charge a fee for the service”, Eisels’ Brief, p.44, as if to suggest this was the decision of the Court. That suggestion is disingenuous. The Court’s statement was merely its summary of the conclusions reached in the cases listed in the footnote and is certainly not the holding in First Escrow. To the extent it even mentions “lenders”, it cannot be more than the above-mentioned survey of decisions from other

² The decision in First Escrow predates the decisions in Dressel v. Ameribank, 664 N.W.2d 151 (Mich. 2003), King v. First Capital Financial Services Corp., 828 N.E.2d 1155 (Ill. 2005), and Perkins v. CTX Mortgage Co., 969 P.2d 93 (Wash. 1999), in which those courts held that lenders could charge a separate fee for completing mortgage loan documents.

jurisdictions, because First Escrow did not involve the conduct of a lender – the issue was not before the Court in that case.

Moreover, Midwest was not a mere service provider, assisting the parties to the transactions at issue, as were the real estate brokers and escrow agents in Hulse and First Escrow. Midwest’s factual and legal relations to the Eisels were neither similar nor comparable to the relations the broker and escrow agents in Hulse and First Escrow had with the other parties in those cases. *Midwest was a party to each of the transactions involved here.* Hence, Midwest stands on entirely different footing than the broker in Hulse and the escrow agents in First Escrow. Midwest had a direct financial interest in the proper documentation of each transaction in order to assure its ability to enforce its borrowers’ repayment obligations as well as to be able to re-sell those loans in the secondary mortgage market. Indeed, Midwest completed the loan documents for its own benefit, not for the benefit of its borrowers. That Midwest charged a fee to recoup a portion of the costs for completing those documents and processing those transactions cannot sensibly transform Midwest’s otherwise admittedly legitimate conduct into unlawful law business.

The Eisels charge that Midwest “misstates the holding” of this Court in Hulse and First Escrow. Eisels’ Brief, p.49. In making this charge, the Eisels disingenuously, and with conscious misdirection, misconstrue and misstate Midwest’s argument. Midwest never argued that this Court said a real estate broker or escrow closing company could charge a separate fee for preparing documents. Rather, Midwest noted that in those cases the Court stated the mere filling in of blanks in standardized, pre-printed mortgage forms

is not the unlawful law business under §484.010, and then Midwest questioned how, as a matter of common sense and logic, the charging of a fee for such activity could transmogrify it into the unlawful practice of law. Midwest's Brief, pp.50-51.

In response, the Eisels argue that an otherwise lawful activity can become unlawful simply by charging or paying money in connection with it. Eisels' Brief, p.49, citing three criminal statutes that prohibit prostitution, gambling and bribery. Eisels' Brief, pp.50-51. The citations to these statutes are a contrived and false analogy between the statutes and §484.020.

The cited statutes are nothing more than secular expressions of moral or religious strictures on conduct, reflecting Missouri's values and norms, dictating that persons not only should not profit from the conduct proscribed, they should not even engage in it. Contrariwise, §484.020 is an aid to this Court in its efforts to carry out its duty "...to protect the public from being advised or represented in legal matters by incompetent or unreliable persons." First Escrow at 840. The criminal statutes cited by the Eisels constitute a fatally flawed premise for the Eisels' argument.

Both Hulse and First Escrow enumerate several factors, none of which, in the Eisels' words, can be "glossed over". Eisels' Brief, p.40-41,43. The charging of a fee is only one among those factors. Under the Court's factorial analysis, the charging of a fee is singularly non-determinative. Thus, it is not possible under the Court's holdings in these cases for permissible conduct to be transformed into illegal conduct *automatically* by virtue of charging a fee. Such illogic undermines the very purpose of the Court's factorial test.

The Eisels also expend substantial verbiage arguing that the General Assembly's recent enactment of §484.025 was in response to litigation against mortgage lenders to "...change[] the existing law by carving out an exception to the statutory ban on mortgage lenders charging a separate fee for completing loan documents for those lenders who charge a fee under \$200." Eisels' Brief, pp.45-46. There is no legislative history to support the Eisels' argument; therefore, it amounts to self-serving speculation. Moreover, an equally plausible, if not more logical, explanation for the enactment of §484.025 is that the General Assembly regarded these lawsuits as contrary to the intent of §484.020, and, therefore, §484.025 was enacted simply to clarify that intent. The General Assembly never intended §484.020 to prohibit residential mortgage lenders from charging a nominal document preparation fee, and the new statute merely makes explicit that such a fee is not prohibited.

On "policy grounds," the Eisels argue that prohibiting non-lawyers from charging for document preparation makes sense, because charging a fee "suggests that the preparation of the documents is itself an economic driver for the transaction and that the non-lawyer prepares the documents as a money-making activity." Eisels' Brief, pp.51-52. This suggestion, to say the least, is strange logic. The "economic driver" for the loans Midwest makes is the interest it charges its borrowers, not the fee it charged to document and process those loans. It is undisputed that Midwest charged this fee merely to recoup a portion of its costs of those activities. And as Midwest demonstrated in its original Brief, its completion of these documents, to which it is a party, is an integral and essential part of its mortgage lending business.

Determining whether the preparation of documents is itself an activity engaged in to make money in connection with a transaction is the very purpose of the factorial test enunciated in Hulse. “We think the guiding principle must be whether under the circumstances the preparation of the papers involved is the business being carried on or whether this really is ancillary to and an essential part of another business.” Hulse at 862. Midwest did not complete the documents at issue to make money on that activity; Midwest completed the documents to assure the enforceability of its security interests and the marketability of its loans in the secondary market, as an essential part of its mortgage lending business. The Eisels have offered nothing to suggest otherwise.

Despite the Eisels’ attempt at misdirection, Midwest pointed out that a computer generates the relevant documents merely to emphasize that its clerical employees exercise no discretion in filling out the forms. A computer does not decide which forms to use; rather, the quasi-governmental and institutional entities involved in the secondary mortgage market have determined which forms are required for participation in that market. Software selects documents necessary for a particular transaction because it has been programmed to produce forms required by the market for a particular type of transaction, not because it is controlled by a robot bent on deception.

The Eisels further engage in conscious misdirection by claiming that Midwest has somehow misled consumers. They assert that a consumer should be able to conclude “through simple syllogistic logic that documents for which a document preparation fee is paid have been prepared or reviewed by a lawyer” and that “*some* lawyer has vetted the documents”. Eisels’ Brief, p.56. However, these documents *have* been prepared,

reviewed and vetted by lawyers, Midwest’s Brief, pp.13-14; Countrywide’s Amicus Brief, p.6.

The Eisels criticize Midwest for citing cases from other jurisdictions that have considered and adopted a *pro se* exception, permitting mortgage lenders to charge a document preparation fee. Eisels’ Brief, p.57. Yet the Eisels in turn survey outdated cases from other jurisdictions in an effort to demonstrate that other courts have prohibited such fees. In doing so, they overlook the fact that their decisions largely fail to address the *pro se* exception at all.

King, *supra*, and Dressel, *supra*, cited by Midwest, represent the current views on the issue and are consistent with this Court’s analysis in Hulse and First Escrow. In King, the Illinois Supreme Court held based on the “*pro se* exception” that a mortgage lender that uses non-lawyers to complete standardized loan documents does not engage in the unauthorized practice of law by charging a fee for completing documents. King at 1163. The Illinois court’s *pro se* exception is little more than a variant of this Court’s “personal interest test” articulated in First Escrow. Midwest’s Brief, p.68.

Contrary to the Eisels’ mischaracterization, it is not true that “Hulse prohibits *pro se* parties from charging others for preparing legal documents, while King does not.” Eisels’ Brief, p.59. Hulse did not involve a *pro se* party. Nor does the fact that Missouri’s statute provides a private cause of action for its violation have any impact on the Illinois’ Supreme Court’s analysis of the underlying substantive issue, or this Court’s analysis in Hulse. The Eisels’ efforts to distinguish King yield a distinction without a difference.

Analysis under the Michigan statute prohibiting unlawful law business is also instructive because, like Missouri's statute, it preserves the notion that the proscribed conduct is the representation of a third party, not participation by a party to that transaction. Midwest's Brief, p.51 n.6. The statute in Dressel prohibited corporations "to make it a business to practice as an attorney-at-law, for any person other than itself...." Dressel at 154. In disposing of the issue of whether the defendant bank engaged in the unlawful practice of law by charging a fee for the completion of standard mortgage documents, the Court stated the defendant "was not practicing law when it completed the mortgage forms...." Id. at 157. "It is immaterial that it charged for its services. Charging a fee for nonlegal services does not transmogrify those services into the practice of law." Id.

The cases cited by the Eisels all predate 1985, save a single opinion of the Indiana Appellate Court, which, bound by a 1984 Indiana Supreme Court case, provided no analysis of the issue beyond simply holding that the prior state supreme court's decision "prohibits any fee." Lawson v. First Union Mortgage Co., 786 N.E.2d 279, 283 (Ind. App. 2003) (citing Miller v. Vance, 463 N.E.2d 250, 253 (Ind. 1984)). Even the Miller court merely stated a brightline rule that, in 1984, in the middle of the S&L Crisis, a bank could not charge a document preparation fee. This brightline rule is inconsistent with the factorial analysis this Court articulated in Hulse and First Escrow. Moreover, the *current* trend, *i.e.*, King (2005), Dressel (2003), and Perkins (1999), is to permit lenders, as parties to the transactions, to charge document preparation fees.

This Court is certainly not bound by the unreasoned opinions of other courts, particularly when they are inconsistent with the Court's own reasoning in prior cases. All of the other cases cited by the Eisels, dating from 1936 to 1981, involve title companies and real estate brokers. Eisels' Brief, pp.66-69. None of these cases are relevant because they all involve the preparation of documents by non-parties to the transactions. Further, the state statutes the Eisels reference, Eisels' Brief, pp.69-70, have zero bearing on this Court's analysis of Missouri law.

On the other hand, the authority cited by Midwest is directly on point. Under the *pro se* exception articulated in King and the "personal interest" test set forth in First Escrow, it is clear that the mere fact that Midwest charged a separate fee to complete the documentation of the loans it made in an effort to recoup a portion of the costs it incurred in connection with that documentation activity does not transform otherwise permissible conduct into the unlawful law business. The factorial analysis established by this Court, not a strained reading of the statute or a series of outdated, readily distinguishable cases from foreign jurisdictions, is key to this determination.

The Eisels assert that Hulse and First Escrow have already decided that the *pro se* exception does not apply under Missouri law. Eisels' Brief, p.74. Again, the Eisels ignore this Court's factorial analysis and insist on treating all non-lawyers alike, whether they were parties to the transaction or not. Of course, Hulse and First Escrow both involved *non-parties*, while this case does not. Moreover, even a careful reading of the statute demonstrates that a party to a transaction does not engage in unlawful law business, whether or not a fee is charged, because it is not acting in a "representative

capacity.” The Eisels completely gloss over this critical factor and ignore Midwest’s application of this Court’s factorial analysis as well as the well-reasoned and persuasive discussion of the *pro se* exception articulated in King.

IV.

THE VOLUNTARY PAYMENT DOCTRINE BARS THE EISELS FROM RECOVERY IN THIS CASE.

The Eisels argue that the voluntary payment doctrine is not applicable to statutory claims, based on an excerpt from National Enameling & Stamping Co. v. City of St. Louis, 40 S.W.2d 593,595 (Mo. 1931): “Except where it is otherwise provided by statute....” Eisels’ Brief, p.75. They contend that their claims “are provided by statute”, §484.020, and therefore, the exception trumps the protection otherwise afforded to Midwest by the doctrine. The Eisels are wrong.

The quote from National Enameling was itself quoted from CORPUS JURIS. The authorities cited by CORPUS JURIS supporting the exception were a California statute which, according to CORPUS JURIS, provided “...that a misapprehension of the law by all parties, ...is such a mistake as to destroy the reality of consent to a contract, money paid under such a mistake of law may be recovered by the payor”, and Louisiana statutes which provided “...that one who receives what is not due him, whether through error or knowingly, shall restore it ... and he who has paid through mistake, believing himself a debtor, may reclaim what he has paid....” 48 C.J., §312, p.755, n.44[a] and [b]. Thus, when CORPUS JURIS stated the voluntary payment doctrine prohibits the recovery of payments voluntarily made “[e]xcept where it is otherwise provided by statute”, the treatise referred to statutes that expressly and specifically negate the elements of the doctrine. In this case, §484.020 does not contain a provision expressly negating the elements of the doctrine or otherwise nullifying its application in this case.

The Eisels also cite McClure v. Nowick, 382 S.W.2d 731 (Mo.App. 1964), to argue that the voluntary payment doctrine is inapplicable to statutory claims. Eisels' Brief, p.76. In McClure, a debtor was permitted to recover usurious interest payments made to a pawnbroker. The Court of Appeals relied upon a common law doctrine that deems usurious interest payments to be involuntary. Id. at 733. That doctrine relates only to usury and is irrelevant here.

The Eisels additionally contend that the voluntary payment doctrine is not applicable to a claim brought under §484.020, quoting a sentence from Bray v. Brooks, 41 S.W.3d 7,13 (Mo.App.W.D. 2001: “[t]he activities prohibited by §484.010 are not subject to waiver, consent or lack of objection by the victim.” Eisels' Brief, p.76. Under the facts of Bray, this bare statement merely means that the parties in that case, by a business agreement, could not provide that the non-lawyer scrivener could circumvent the statute and engage in the practice of law; it does not address the voluntary payment doctrine at all. Nor did the defendant assert the doctrine as a defense. Moreover, the court offered no citation of authority or reasoning in support of its bare statement. Understandably, neither do the Eisels. The statement is so overbroad and all-encompassing as to be meaningless. The express terms of §484.020 do not support such a conclusion. Nor is Midwest aware of any legal principle that would support it. Notwithstanding the gratuitous statement in Bray, the voluntary payment doctrine bars the Eisels' recovery in this case.

The Eisels further argue the voluntary payment doctrine only applies when a plaintiff makes a payment “with full knowledge of all facts...”. Here, the Eisels contend,

Midwest offered no evidence that any class member acted “with full knowledge of all facts”. Eisels’ Brief, p.77. This disingenuous contention turns a blind eye to the Eisels’ stipulations: before each mortgage loan closing, the document preparation fee and the amount of the fee were disclosed to each class member. L.F.Vol. III, p.372, ¶¶35-36. Moreover, Mrs. Eisel, the class representative, testified that at closing, the fee was fully disclosed to her and she knew she was paying it. Deft’s Ex.B, Patricia Eisel Deposition, p.103. The Eisels and the other class members clearly “acted with full knowledge of all facts.” *See King*, at 1172-1173 (itemization of document preparation fees on closing statements held to provide plaintiffs with knowledge of facts sufficient to support application of voluntary payment doctrine).³

³ The Eisels argue that the question of “full knowledge” is a fact question; all fact issues upon which the trial court made no specific findings must be considered as having been found in accordance with the result reached; and, therefore, this Court should defer to the trial court’s purported implicit finding that the class members did not have “full knowledge of all facts”. Eisels’ Brief, p.77. However, where, as in this case, the facts are largely stipulated, it is error for the trial court to find a fact contrary to the parties’ stipulations. *Orthotic & Prosthetic Lab, Inc. v. Pott*, 851 S.W.2d 633,639 (Mo.App.E.D. 1993). As noted above, the so-called implicit finding of the trial court to which the Eisels ask this Court to defer is in conflict with the parties’ stipulations and the evidence. Therefore, this Court owes no deference to it.

To overcome their admitted knowledge, the Eisels assert that a “fact” of which they were not aware was that “non-lawyers prepared the final legal documents for their transactions.” Eisels’ Brief, pp.77-78. This argument was not raised in the Court of Appeals. The Eisels previously argued that the “fact” of which they were not aware was that “the document preparation fee charged was illegal and contrary to statute.” Respondents’ Brief, p.30. Realizing that this argument was completely unavailing, the Eisels have shifted gears and assert a new, yet equally flawed, basis for the alleged exception to the voluntary payment doctrine. They are not permitted to do so. MO. SUP. CT. R.83.08(b).

Moreover, this new characterization of the Eisels’ supposed ignorance is merely an artful way of claiming that they did not know that the payment of the fee was allegedly illegal. The argument is a transparent attempt to recast the so-called ignorance of the class members as one of fact rather than one of law to avoid the proper application of the doctrine in this case. However, this Court long ago stated that “ignorance or misapprehension of the law” respecting the validity of a demand for a payment is “no ground for relief” from the doctrine. National Enameling, 40 S.W.2d at 595.

Furthermore, the Eisels stipulated that the HUD-1 settlement statement disclosed a “document preparation fee” or a “processing fee.” L.F.Vol.III, pp.372-73 ¶¶35-36. While the HUD-1 also has a line item for an “attorney fee,” Midwest’s fee was never disclosed as such, demonstrating that the Eisels knew they were not paying for the services of an attorney in connection with their loan. Exs. MBC-31, MBC-46. Regardless, the relevant knowledge in this instance is whether the Eisels knew they were

paying a fee for the preparation of their loan documents, and they did. Their knowledge of the alleged illegality of that conduct is not relevant to the proper application of the voluntary payment doctrine.

The Eisels also argue that the voluntary payment doctrine does not apply to transactions where the recipient knows he has no right to the money, citing Ticor Title Ins. Co. v. Mundelius, 887 S.W.2d 726, 728 (Mo.App. 1994). Eisels' Brief, p.78. That case does not stand for that proposition – the opinion does not even mention the argument for which the Eisels have cited it.

Nevertheless, the Eisels contend that the voluntary payment doctrine is not a bar to their recovery because “one can infer that Midwest knew it had no right” to the fees because of the “clear legal guidance given by Hulse and In re First Escrow.” Eisels' Brief, p.78. The purported inference is unreasonable and flies in the face of the facts and circumstances surrounding this litigation. Midwest was one of some twenty-six lenders named as defendants in the original class action that ultimately led to this appeal, each of whom were alleged to have charged their customers the same document preparation fees that are the subject of this appeal. It simply defies logic and common sense, as well as the inference suggested by the Eisels, that all of these lenders “knew [they] had no right” to the money. Moreover, unlike the situation in Hulse, the Bar has never filed a complaint against the lenders for their conduct.

Furthermore, the parties stipulated that each member of the plaintiff class in this case received a HUD-1 Settlement Statement at the time of the closing of their mortgage loan. L.F.Vol. III, p.365, ¶10. This is a form required by the federal government. Id. at

p.369, ¶24. These HUD-1s itemize closing costs to be paid by borrowers, including document preparation fees and processing fees. Id. at p.365, ¶10. In view of these stipulated facts, if any inference fairly should be drawn, it is that Midwest reasonably believed it had a right to charge these fees that the federal government includes on its form settlement statements.

CONCLUSION

For all of the foregoing reasons, as well as those stated in Midwest's Substitute Brief, the trial court's judgment should be reversed.

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Furthermore, the undersigned certifies that: (1) Appellant's Substitute Reply Brief complies with the limitations contained in Rule 84.06 (excluding the cover, certificate of service and compliance, signature block and appendix, there are 7606 words in Appellant's Substitute Reply Brief); (2) the name and version of the word processing software used to prepare Appellant's Substitute Reply Brief is Microsoft Word; and (3) the diskette provided to this Court has been scanned for viruses and is virus-free.

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