

MISSOURI SUPREME COURT

Appeal No. SC 88761

James M. Finnegan,
Appellant

v.

Old Republic Title Company
of St. Louis
Respondent

Appellant's Substitute Brief

GREEN JACOBSON & BUTSCH, P.C.
Fernando Bermudez #39943
7733 Forsyth Blvd., Suite 700
Clayton, MO 63105

Tel: (314) 862-6800
Fax: (314) 862-1606

Email: bermudez@stlouislaw.com

Attorney for appellant

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

The trial court decided this case by granting summary judgment to the defendant, Old Republic Title Company of St. Louis (“Old Republic”). (L.F. 149-52). The plaintiff, James Finnegan (“Finnegan”) admitted seven of the ten statements of uncontroverted facts in Old Republic’s summary judgment motion. (L.F. 27-29, 92-93). Without objection from Finnegan, Old Republic submitted supporting documents for two of the three disputed factual points which Finnegan accepts as true for purposes of this summary judgment motion. (L.F. 119-148). Therefore, the only fact at issue was the date when Finnegan filed his petition, a fact not relevant to this appeal. Therefore, there should be no disputes about any relevant facts.

Finnegan filed a three count petition against Old Republic alleging three counts: violation of the Missouri Notary Public Statute, unjust enrichment, and violation of the Missouri Merchandising Practices Act. (L.F. 5-14). All three counts share the same basic facts. Finnegan, on his own behalf and on behalf of all others similarly situated, alleged that Old Republic provided the notary public services when he purchased his home. Finnegan alleged that because Old Republic did not do everything required by the Missouri Notary Public Statute necessary to earn a \$2 per signature fee, it overcharged him. (L.F. 5-14).

The only facts material to this appeal are that Old Republic notarized five signatures and charged Finnegan \$10. (L.F. 27-29, 92-93, 119-148). After Old Republic filed supplemental documents along with its reply memorandum in support of its motion for summary judgment, Finnegan did not dispute that three of the five signatures were publicly recorded at the Recorder of Deeds. (Id.)

POINTS RELIED ON

- I. The trial court erred in granting Old Republic's summary judgment motion on the violation of the Missouri Notary Public Statute claim because Old Republic charged \$10 for notarizing five signatures that it failed to record in its journal in that the statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in the journal.

Dickey v. Royal Banks of Missouri, 111 F.3d 580 (8th Cir. 1997);

Herrero v. Cummins Mid-America, Inc., 930 S.W.2d 18

(Mo.App. W.D. 1996);

J.S. v. Beard, 28 S.W.3D 875 (Mo. banc 2000);

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

866 (Mo. banc 2006);

- II. The trial court erred in granting Old Republic summary judgment on the unjust enrichment claim and the Missouri Merchandising Practices Act claim because Old Republic's success on those claims is dependent on its claim that it charged Finnegan the proper amount (Point Relied On I) in that, as explained in Point I, Old Republic charged more than the authorized amount.

ARGUMENT

I. The trial court erred in granting Old Republic’s summary judgment motion on the violation of the Missouri Notary Public Statute claim because Old Republic charged \$10 for notarizing five signatures that it failed to record in its journal in that the statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in the journal.

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

Finnegan alleged that Old Republic overcharged him for notary fees because notaries can only be paid \$2 per signature if they notarize the signature *and* record it in their journal.¹ No party disputes that Old Republic

¹ Finnegan’s petition also alleged that there were an insufficient number of signatures notarized by Old Republic to support its fee even if it were allowed

notarized five signatures. Finnegan alleged that none of the signatures were recorded in the notarial journal. (L.F. 7 at ¶ 15). Because Old Republic moved for summary judgment, it carried the burden of proof to establish all facts that entitle it to summary judgment. *Cooper v. Albacore Holding*, 204 S.W.3d 238 (Mo.App. 2006). Nowhere does Old Republic allege, much less prove, that it recorded any of the signatures in a notarial journal. As such, the \$10 fee that Old Republic charged was excessive because, as will be explained below, the absolute maximum that it could have charged was \$1 per signature for a total of \$5.

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

1. The maximum fee in this state for notarization of each signature *and the proper recording thereof in the journal of notarial acts* is two dollars for each signature notarized. (Emphasis added.)
3. The maximum fee in this state is one dollar for any other notarial act performed.

to charge \$2 per signature. That issue is not on appeal.

5. A notary public who charges more than the maximum fee specified ... is guilty of official misconduct.

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

The facts are that Old Republic charged \$10 for notarizing five signatures but did not record any in its notary journal.

The legal issue is whether Old Republic overcharged him. The language in §486.350(1), RSMo., is plain and unambiguous. Notaries must do *two* things to charge a \$2 per signature fee. First, they must notarize a signature. Second, they must record the signature in their journal. If they do not perform these two acts they cannot charge a \$2 per signature fee. None of the signatures were recorded in journals. Therefore, it cannot collect \$2 per signature.

This interpretation is consistent with the views of the relevant administrative agency. The Missouri Secretary of State issued a “Document

Certification Services” handbook to assist notaries in performing their duties. This handbook not only outlined the two obligations appearing above, it emphasized that *both* obligations must be performed to collect two dollars: “The notary is allowed by law to charge a fee of \$2.00 for each signature notarized and RECORDED IN THEIR NOTARY JOURNAL.” (Capitalization in original.) (Appendix at 26.) This interpretation has been consistently held by whomever has been elected Secretary of State. (Appendix at 31.)

The only real issue is whether Old Republic can collect \$1 per signature under §486.350(3), RSMo., or are instead precluded from charging anything. Under either scenario, the trial court improperly granted summary judgment because, at maximum, Old Republic could have charged \$5 for notarizing five signatures but it charged \$10.

Section 486.350(3), RSMo., allows notaries to charge one dollar for “any other notarial act performed.” The \$1 charge for “any other notarial act performed” in §486.350(3), RSMo., is reserved for notarial acts other than notarizing signatures. Subsections one and two of this statute apply to notarizing signatures thus the reference in subsection three to “other” acts must refer to things other than notarizing signatures. For example, notaries may take acknowledgments, administer oaths and affirmations, and certify that a copy of a document is a true copy of another document. §486.250,

RSMo. Those are the acts that fall within the realm of the \$1 charge in §486.350(3), RSMo. Performing an incomplete act, like Old Republic in this case, is not the type of act that subsection three contemplates. It would create an incentive for notaries not to comply with the journal recording requirement. That could not have been the intent of the legislature. Thus, Old Republic was not entitled to charge anything for its incomplete acts.

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

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

[a]s used in sections 486.200 to 486.405 'official misconduct' means the wrongful exercise of a power or the wrongful performance of a duty. The term 'wrongful' as used in the definition of official

misconduct means unauthorized, unlawful, abusive, negligent, reckless, or injurious.

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

Old Republic cited two cases where courts discuss “official misconduct.” Neither help Old Republic. In *Herrero v. Cummins Mid-America, Inc.*, 930 S.W.2d 18 (Mo.App. W.D. 1996) and *Dickey v. Royal Banks of Missouri*, 111 F.3d 580 (8th Cir. 1997), plaintiffs sued notaries public because the notaries failed to notarize the plaintiffs’ signatures in their presence or failed to record the signatures in journals, contrary to the law. The plaintiffs were attempting to escape the legal ramifications of the notarized documents. The plaintiffs, however, never disputed the authenticity of their signatures and, in *Herrero*, affirmatively consented to the notary notarizing the signature outside her presence. The courts reasonably rejected the plaintiffs’ claims

because the remedy that the plaintiffs sought (escaping legal ramifications of notarized documents) was not linked to the alleged breach by the notary. The courts refused to set aside the documents or negate their legal impact because the plaintiffs did not challenge the authenticity of their signatures which would establish a link between the breach and the remedy sought. *Id.*

Unlike those cases, Finnegan is not attempting to undo any part of his real estate transaction or escape the legal ramifications of the documents. He has not claimed that the notaries or their employers are liable, in any way, for any deficiencies in his home purchasing. He is simply claiming that Old Republic illegally overcharged him for notarial services. The harm that he suffered (overpaying for notarial fees) exactly match the relief he is seeking, *i.e.*, the amount that he was overcharged. Old Republic's fatal error is failing to distinguish the disconnect between the harm suffered by the plaintiffs in the cases that it cite and remedy sought by those same plaintiffs from the perfect parallel between the harm suffered by Finnegan and the remedy that he seeks.

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

II. The trial court erred in granting Old Republic summary judgment on the unjust enrichment claim and the Missouri Merchandising Practices Act claim because Old Republic's success on those claims is interdependent on its claim that it charged Finnegan the proper amount (Point Relied On I) in that, as explained in Point I, Old Republic charged more than the authorized amount.

Old Republic made very similar arguments to support its motion for summary judgment on the unjust enrichment claim and the Missouri Merchandising Practices Act ("MMPA") claim. (L.F 25). In its motion on the unjust enrichment claim, Old Republic argued that "it is not inequitable for Plaintiff to have been charged the appropriate amount for notary fees." (Id.) On the MMPA claim, it argued that "because he was charged the proper amount for the documents that were notarized in connection with his residential real estate purchase ... there is no unfair practice or deception" (Id.) Its memorandum in support of its motion tracks those argument and adds nothing more. (L.F. 81-82). The factual predicate for both of those arguments is that Old Republic charged the proper amount. As was shown in Point I, Old Republic is wrong; it overcharged Finnegan. Because Old Republic's arguments on these points are inexorably tied to its argument in Point I, these arguments also fall. In other words, there is no way that Old

Republic can win on these Points without also winning Point I. Likewise, Finnegan candidly admits that if he was not overcharged, his claim for unjust enrichment and the MMPA cannot survive independently. Finnegan is confident, however, that all three claims will survive.

Finnegan has not cited to any cases or statutes in this Point because the sole purpose of this point is to show that Old Republic's success on this Point depends on its success in Point I. No authority is necessary, or even possible, for that proposition.

CONCLUSION

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

Respectfully submitted,

GREEN JACOBSON & BUTSCH, P.C.

By: _____
Fernando Bermudez #39943
7733 Forsyth Blvd., Suite 700
Clayton, MO 63105
Tel: (314) 862-6800
Fax: (314) 862-1606
Email: bermudez@stlouislaw.com

Attorney for appellants