IN THE SUPREME COURT OF MISSOURI

NO. SC94152

THOMAS BINKLEY, ET AL.,

Plaintiffs/Appellants,

v.

AMERICAN EQUITY MORTGAGE, INC.,

Defendant/Respondent.

Appeal from the Circuit Court of the County of St. Louis, State of Missouri
The Honorable Thomas W. DePriest, Division 8

SUBSTITUTE BRIEF OF RESPONDENT

CARMODY MACDONALD P.C.
David P. Stoeberl, #46024
Tina N. Babel, #58247
Lauren M. Wacker, #62087
120 South Central Avenue, Suite 1800
St. Louis, Missouri 63105
(314) 854-8600 Telephone
(314) 854-8660 Facsimile
Attorneys for Respondent

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INTRODUCTION AND SUMMARY

This case was brought by borrowers who obtained mortgage loans from Respondent American Equity Mortgage, Inc. ("Respondent"). Years after the loans closed, the plaintiffs filed a three-count Class Action Petition against Respondent, asking for certification of a class and alleging claims for the unauthorized practice of law, violation of the Missouri Merchandising Practices Act ("MMPA") and unjust enrichment. The main thrust behind their claims is that Respondent "drafted" or "procured" standardized mortgage documents without a Missouri-licensed attorney present and for a fee.

Under Missouri law, to prevail on a civil action for the unauthorized practice of law, a plaintiff must establish two essential elements: (1) the drawing, procuring or preparation of conventional legal documents and (2) the charging of a separate fee for the legal documents' preparation or varying the customary charges based upon whether documents are to be prepared in the transaction. *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335, 339 (Mo. banc 2007). Because Appellants did not raise a genuine dispute as to whether they could meet the second element, the trial court properly entered summary judgment in Respondent's favor.

On appeal, Appellants rely on an incorrect reading of this Court's decision in *Hargis v. JLB Corp.*, 357 S.W.3d 574 (Mo. banc 2011). According to Appellants, the *Hargis* Court dramatically altered the law governing the unauthorized practice of law by eliminating the consideration element in instances where a party "procures" legal documents.

Appellants' argument is contrary to Missouri law, including the *Hargis* decision. Moreover, if this Court were to adopt Appellants' flawed interpretation of *Hargis*, it would effectively overrule not only this Court's considerable precedent that the *Hargis* case cites with approval; it would also directly conflict with the very state statute which defines the practice of law. The "consideration" element of an unauthorized practice of law claim is still very much alive. Its absence in the case at bar is not only dispositive of Appellants' claim that Respondent engaged in the unauthorized practice of law, but is also dispositive of Appellants' other two claims since both of those claims required a finding that Appellants provided consideration to Respondent in exchange for the legal documents utilized in conjunction with Appellants' loans.

Because the trial court correctly interpreted and applied Missouri law, and because no consideration passed from Appellants to Respondent for the legal documents provided for those loan transactions, the trial court properly granted Respondent's summary judgment motion.

STATEMENT OF FACTS

I. THE UNDERLYING TRANSACTIONS

In 2009, Appellants Roland and Susan Sturhahn ("Sturhahns") entered into a transaction with Respondent to obtain a residential mortgage loan from Respondent for real property located in O'Fallon, Missouri. (L.F. 27). Likewise, in 2011, Appellants Thomas and Harlene Binkley ("Binkleys") entered into a transaction with Respondent to obtain a residential mortgage loan from Respondent for real property located in Fenton, Missouri. (L.F. 29).

In connection with both transactions, deeds of trust, promissory notes and/or planned unit development riders ("Legal Documents") were prepared. (L.F. 21, 27-30). HUD-1 settlement statements were prepared in connection with both loans, each setting forth the various fees charged by Respondent in connection with Appellants' loan transactions with Respondent. (L.F. 27-29). The Sturhahns' HUD-1 includes a "loan origination fee" on line 801 in the amount of $2,238. (L.F. 28). Furthermore, the Sturhahns' HUD-1 includes a line labeled "Document preparation." (L.F. 28). That line is blank. (L.F. 28).

Similarly, the Binkleys' HUD-1 sets forth each and every fee charged to the Binkleys in connection with their loan transaction with Respondent. (L.F. 29, 151-54). The Binkleys' HUD-1 includes an "origination charge" of $2,320.93, as set forth on line 801. (L.F. 29, 152). The components of the origination charge are broken down on the Binkleys' "Addendum to HUD-1" as follows:

MERS Registration Fee	11.95
Loan Origination Fee	676.27
Processing Fee	475.00
Underwriting Fee	495.00
Wire Fee	51.00
Administration Fee	499.00

(L.F. 29, 154). The Binkleys' HUD-1 does not reflect a charge for the preparation of Legal Documents. (L.F. 30, 151-54). The Binkleys certified in writing that the HUD-1 Settlement Statement "is a true and accurate statement of all receipts and disbursements made on [their] account or by [them] in this transaction." (L.F. 30).

As evidenced by the HUD-1 settlement statements, Respondent did not charge the Sturhahns or the Binkleys a separate, additional fee for the preparation of Legal Documents, nor did it vary its customary charges based upon whether Legal Documents were prepared in connection with the loans. (L.F. 28-30).

II. APPELLANTS' CLASS ACTION PETITION

Appellants filed their Class Action Petition against Respondent and Wolters Kluwer Financial Services, Inc. ("Wolters") on May 4, 2012. (*See* L.F. 134). Appellants asserted claims for engaging in the unauthorized practice of law or doing law business against Respondent (Count I), violations of the MMPA against Respondent and Wolters (Count II), unjust enrichment against Respondent and Wolters (Count III), and engaging in the unauthorized practice of law or doing law business against Wolters (Count IV). (L.F. 143-49). The Class Action Petition specifically provides that Appellants were

seeking recovery of alleged unlawful "fees" under MO. REV. STAT. §§ 484.010 and/or 484.020.[1] (L.F. 144-145). In fact, Appellants' proposed class is defined, in sum, as all persons who paid a fee "for the 'practice of law' or the 'law business,' as those terms are defined in Missouri Revised Statutes §§ 484.010.1 and 484.010.2, respectively, or by Missouri case law." (L.F. 139).

Appellants did not allege that the Legal Documents provided in their loan transactions were faulty or that Appellants were otherwise damaged directly by a mistake in the Legal Documents. (*See* L.F. 143-49). On July 30, 2013, Appellants voluntarily dismissed Wolters. (*See* L.F. 5).

III. THE MOTION FOR SUMMARY JUDGMENT

On March 6, 2013, Respondent moved for summary judgment on all of Appellants' claims ("Motion"). (*See* L.F. 84). Respondent argued that Appellants' claim for the unauthorized practice of law failed as a matter of law because Appellants were unable to establish the second element of that claim: that Respondent charged a separate fee for providing legal documents or increased its customary charges based upon whether legal documents had been provided. (L.F. 87-92). Specifically, Respondent set forth in its Statement of Uncontroverted Facts that it "did not charge [Appellants] a separate, additional fee for the preparation of Legal Documents or vary its customary charges based upon whether Legal Documents were prepared…" (L.F. 109-110, 113). In

[1] Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2014).

accordance with Rule 74.04(c)(1), this statement was supported by an Affidavit of the President and CEO of Respondent, in which she testified as follows:

> The loan origination fee[s] set forth in [Appellants' HUD-1 Settlement Statements] compensated [Respondent] for issuing the loan[s] and did not compensate for the preparation of any legal documents, including without limitation, any deeds of trust, promissory notes and/or planned unit development riders… [Respondent] did not charge [Appellants] … separate, additional fee[s] for the preparation of Legal Documents or vary its customary charges based upon whether Legal Documents were prepared in connection with the [Appellants' loans].

(L.F. 113).

In response to Respondent's Motion, Appellants did not argue that Respondent had in fact charged a fee or other valuable consideration. (*See* L.F. 75-82). In fact, with respect to Respondent's assertion that it did not charge a separate fee or vary its customary fees, Appellants merely replied "Deny." (L.F. 28, 30). Under Rule 74.04(c)(2), bare denials that are wholly lacking support from specific references to the discovery, exhibits or affidavits, are deemed to be "admission[s] of the truth of [those] numbered paragraph[s]." *See Peck v. Alliance General Ins. Co.*, 998 S.W.2d 71, 75 (Mo. App. 1999) ("Where the response does not … contain any citations to the record to

rebut the factual assertions in the motion, as required by Rule 74.04(c), we take the factual assertions contained in the motion as true.").

In short, before the trial court on Respondent's Motion for Summary Judgment, it was factually undisputed that Respondent did not charge Appellants any consideration whatsoever – be it in the form of a separate, discrete fee or in the form of an increase of Respondent's customary fees – in exchange for the preparation or procurement of legal documents.[2] Thus, Respondent argued that Appellants were unable to prove an essential

[2] Despite Appellants' repeated statements that American Equity paid a "third party for the completed [or finished] legal documents" and that such documents were not reviewed by a Missouri-licensed attorney (A.B. 1-2, 8, 10), such contentions do not appear in the record below – nor are these correct recitations of the facts. To the contrary, the record is devoid of any reference as to whether a Missouri attorney reviewed the forms generated by software provided by Wolters; only that Respondent did not employ or engage a person who personally reviewed the Legal Documents (defined as the final documents executed by the Appellants). (L.F. 35-36). In addition, Respondent did not purchase "completed" or "finished" forms from Wolters. It purchased forms that were generated electronically from software provided by Wolters. (L.F. 34, 40). Respondent moved for summary judgment on only the second "for consideration" element of Appellants' claim since that issue – the alleged charging of an unlawful fee – was the gravamen of Appellants' claim. Respondent reserved all other arguments.

element of that cause of action.[3] (*See* L.F. 14-16).

On May 17, 2013, the trial court entered its Order and Judgment, in which it found that "there are no genuine disputes as to any material fact and that [Respondent] is entitled to judgment as a matter of law as to all of the counts in [Appellants'] Class Action Petition." (L.F. 13). This appeal followed.

[3] In its Motion for Summary Judgment, Respondent also argued that Appellants' MMPA and unjust enrichment claims failed as a matter of law because they were derived from the flawed theory that Respondent engaged in the unauthorized practice of law. (L.F. 92-94). In response, Appellants simply stated that those claims were not wholly dependent on their unauthorized practice of law claim and therefore should be allowed to proceed. (L.F. 79-82).

STANDARD OF REVIEW

The standard of review applicable to this appeal "is essentially *de novo*." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "The propriety of summary judgment is purely an issue of law." *Id.* Summary judgment is proper when there is no genuine issue as to any material fact. *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 119-20 (Mo. banc 2010). "If the moving party makes a prima facie showing that it is entitled to judgment as a matter of law, the non-moving party then has a specific burden: 'A denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.'" *Id*. at 120.

The Court may affirm if summary judgment was appropriate on any basis supported by the record. *Brehm v. Bacon Tup.*, 426 S.W.3d 1, 4 (Mo. banc 2014). In that respect, an appellate court is "limited to considering the same information the trial court considered in rendering its decision on the motion for summary judgment." *Clark v. Kinsey*, 405 S.W.3d 551, 552 (Mo. App. 2013) (citation omitted). Likewise, Appellants are confined to relying upon the arguments and issues they raised before the trial court when appealing the trial court's judgment. *Barner v. The Missouri Gaming Co.*, 48 S.W.3d 46, 50 (Mo. App. 2001). As stated in *Barner*, "[a]n appellate court will not review or convict a trial court of error on an issue that was not put before the trial court to decide." *Id.*

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BECAUSE APPELLANTS FAILED TO DISPUTE THAT RESPONDENT DID NOT CHARGE A SEPARATE FEE OR VARY ITS CUSTOMARY CHARGES FOR PROVIDING LEGAL DOCUMENTS.

The trial court properly granted summary judgment in Respondent's favor on Appellants' claim for the unauthorized practice of law because the uncontroverted facts confirm that Appellants could not establish an essential element of their claim: namely, that Respondent either charged a separate fee for the drawing or procurement of the referenced Legal Documents relative to their loans or increased its customary charges based upon whether it drew or procured such Legal Documents. In fact, Appellants did not dispute this element with any competent evidence. (L.F. 28, 29, 30).

Appellants' principal argument on appeal is that this Court, by its decision in *Hargis v. JLB Corp*., 357 S.W.3d 574 (Mo. banc 2011), cast aside the Missouri statute, as well as decades of controlling precedent, which have established the elements of an unauthorized practice of law claim. (Appellants' Substitute Brief ("A.B.") 6-8).

This position completely misreads the Court's plain and clear holding that reaffirmed the well-established rule that a defendant must receive valuable consideration for its role in providing "legal documents" relative to a real estate loan transaction in order to be liable for the unauthorized practice of law. *Hargis*, 357 S.W.3d at 579.

Because Appellants were unable to establish this essential element of their claim (and in fact admitted that they could not), summary judgment was proper.

A. APPELLANTS WERE UNABLE TO ESTABLISH AN ESSENTIAL ELEMENT OF AN ACTION FOR THE UNAUTHORIZED PRACTICE OF LAW.

1. Respondent Received No Consideration in Exchange for Providing Legal Documents.

Appellants' Class Action Petition alleges that Respondent charged a fee for the preparation of the Legal Documents which were allegedly not created by a Missouri attorney.[4] (L.F. 143). Likewise, Appellants' class definition was defined as persons who paid a fee for the "practice of law" or the "law business" as defined in §§ 484.010.1 and 484.010.2. (L.F. 139). Appellants also sought treble damages pursuant to §§ 484.010 and 484.020. (L.F. 145).

The statutes invoked by Appellants define the "law business" as follows:

> [T]he advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular

[4] Though § 484.010 defines the "practice of law" and the "law business" as distinct activities, Missouri courts have historically referred to both activities generally as the "practice of law." *See In re First Escrow, Inc.*, 840 S.W.2d 839, 840 fn.3 (Mo. 1992). Though Appellants' factual allegations in this case solely relate to the "law business," for ease of discussion, the "practice of law" as used herein shall also refer to the "law business," unless otherwise indicated.

> 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.

§ 484.010.2 (emphasis added). A person or entity that has engaged in the practice of law under this statute may be subject to a private civil suit "for treble the amount which shall have been **paid him or it** for any service rendered in violation hereof **by the person … paying the same**." § 484.020.2 (emphasis added).

This Court, which is the final arbiter on what constitutes the unlawful practice of law, has explained that these statutes are the "reference point for determining the scope of the practice of law." *Hargis*, 357 S.W.3d at 578 (internal quotations omitted); *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 338-39 (Mo. banc 2007). Thus, consistent with these statutory provisions, this Court has repeatedly held that in order to establish civil liability for the unauthorized practice of law, a Plaintiff must prove two essential elements: (1) the drawing, procuring or preparation of conventional legal documents, and (2) the charging of a separate fee for the legal documents' preparation or varying the customary charges based upon whether documents are to be prepared in the transaction. *Eisel*, 230 S.W.3d at 339; *Carpenter v. Countrywide Home Loans*, 250 S.W.3d 697, 702 (Mo. banc 2008); *Hargis*, 357 S.W.3d at 578-79. The *Hargis*, *Eisel* and *Carpenter*

decisions, like the case at bar, deal with the issue of the unauthorized practice of law in the context of a real estate loan transaction. The Court has explained the rationale behind the "consideration" element: the charging of a separate additional charge "tends to place emphasis on conveyancing and legal drafting as a business." *Eisel*, 230 S.W.3d at 339.

The sole issue before the trial court with respect to Appellants' unauthorized practice of law claim was whether Appellants could establish the second element – that Respondent either charged a fee for its role in providing the Legal Documents or varied its customary charges based upon whether Legal Documents were provided.[5] On this point, Appellants admitted this vital and dispositive fact in its response to Respondent's Statement of Uncontroverted Material Facts in Support of its Motion for Summary Judgment by failing to provide any contrary, competent evidence. (L.F. 28-30, 109-110).

These facts are similar to those in *Hargis.* At issue in that case was whether the defendant mortgage broker engaged in the unauthorized practice of law in connection with documents utilized in a real estate transaction. *Hargis*, 357 S.W.3d 574. On appeal of the trial court's entry of summary judgment in favor of the broker, this Court looked to the affidavit of the broker's vice president, in which he testified that the allegedly

[5] The first element, the drawing, procuring or preparation of conventional legal documents, was not at issue below, nor is it at issue in this Appeal. Although Respondent disputes that Appellants could establish that Respondent prepared or procured legal documents, because the second element is dispositive, Respondent assumed, for purposes of summary judgment only, that the first element could be met. (L.F. 89).

improper "processing fee" and "administrative fee" were "charged for tasks associated with processing the loan." *Id*. at 583. Moreover, when asked at deposition whether the broker charged for the preparation of legal documents, he testified: "I can tell you none of [our charges have] to do with preparing legal documents." *Id*. This Court concluded: "So far as the record shows, [the defendant] neither charged a separate document preparation fee for preparing the note and deed of trust nor disguised such a fee as part of an administrative or processing charge." *Id*.

Here, like in *Hargis*, Respondent put forth affirmative evidence that the allegedly improper origination fees "did not compensate for the preparation of any legal documents" and that Respondent did not otherwise charge a separate, additional fee or vary its customary charges in exchange for the preparation of Legal Documents. (L.F. 109-110, 113). Because Appellants failed to controvert this evidence, they effectively admitted for purposes of summary judgment that they cannot establish this essential element of their claim. As a result, Respondent's Motion was properly granted. *See Hargis*, 357 S.W.3d at 584 ("This Court can review only the grant of summary judgment on the record before it, and that record does not show that [the broker] engaged in the unauthorized practice of law…").

That the Missouri General Assembly has statutorily required that a valuable consideration be charged in order for liability to attach for drawing or procuring legal documents – and that this Court has likewise consistently enforced such a requirement – is no accident. The General Assembly has defined two levels of potentially actionable activities in this arena: (1) the "practice of law" and (2) the "law business." The practice

of law, which involves advocating in a representative capacity before a judicial body, is actionable whether or not the actor charges consideration. § 484.010.1 However, engaging in the law business, which involves giving legal advice or drawing or procuring legal documents outside of a judicial setting and is what Appellants allege in this case, is only actionable if the actor charges consideration. § 484.010.2.[6]

It is notable that the consideration element is included in one and not the other. In fact, this Court recognized this explicit distinction in *In re First Escrow*:

> [T]he legislature has criminalized the activities at issue here only when they are done for compensation: It is a misdemeanor for a nonattorney to perform '***for a valuable consideration***' services defined as the doing of 'law business' ... It is noteworthy that the 'valuable consideration' language does not appear in the definition of the 'practice of law' Thus, it is a misdemeanor for a nonattorney to act as an advocate in a representative capacity before a court or other tribunal, whether or not compensation is paid for the service.

[6] Appellants' Count I is entitled "Engaging in Unauthorized Practice of Law or Doing Law Business." (L.F. 143). However, Appellants have made no arguments in their Substitute Brief or otherwise that Respondent appeared as an advocate in connection with proceedings before a court or tribunal. (*See* L.F. 143-145). Appellants' sole allegation relates to "doing law business," and its naming of Count I is a misnomer.

840 S.W.2d 839, 843, n.7 (Mo. 1992) (emphasis in original). Given that both this Court and the General Assembly has drawn this distinction between the two activities and found that consideration is a necessary element of doing law business, the trial court properly considered the charging of valuable consideration as a necessary element in this case. Summary judgment was therefore properly granted because Appellants were unable to establish the second element of their unauthorized practice of law claim – that Respondent charged a fee or varied its customary charges based upon whether legal documents were prepared.

2. The HUD-1 Settlement Statements Are Conclusive as a Matter of Law on the Issue of Whether Respondent Charged a Fee for Preparing, Drawing or Procuring Legal Documents.

Furthermore, the HUD-1 settlement statements prepared in connection with Appellants' loans established that no fee for the drafting, procuring, or preparing of legal documents was charged to Appellants. Appellants attached the HUD-1 settlement statements to their Petition and did not dispute the content of those settlement statements. As a result, Appellants' claim that such a fee was charged in variance from the unambiguous agreement of the parties fails as a matter of law.

It has long been the rule in Missouri that the construction of a contract is a question of law and that a clear and unambiguous contract must be enforced as written. *Schneidler v. Feeder's Grain & Supply, Inc.*, 24 S.W.3d 739, 742 (Mo. App. 2000). A party cannot use parol evidence to show that an obligation is other than that expressed in

the written contract. *Whitehill v. Whitehill*, 218 S.W.3d 579, 584-585 (Mo. App. 2007) (citations omitted).

For this reason, and under Missouri law, the settlement statements are conclusive as to whether such fees were charged to Appellants. *Westerfeld v. Indep. Processing, LLC,* No. 4:09-CV-01675-JAR, 2012 WL 1684500, at *2 (E.D. Mo. May 15, 2012). In *Westerfeld*, like here, the plaintiff brought a putative class action alleging that the defendant mortgage providers engaged in the unauthorized practice of law and violated the MMPA by charging an illegal "broker processing fee" and "administrative fee" in connection with residential mortgage transactions. *Id*. at *1. At issue were HUD-1 settlement statements which expressly provided that defendants charged plaintiff an "administration fee," but which left blank the separate line for "document preparation." *Id*. at *2. The district court granted summary judgment in favor of the defendants on the grounds that there was no evidence they charged a separate document preparation fee. *Id*. at *4. The court held that the separate line item for "document preparation" on the settlement statement, which had been left blank, provided "conclusive evidence, **as a matter of law**, that a document preparation fee was not charged." *Id*. at *2 (citing *Washington v. Countrywide Home Loans, Inc*., 655 F.3d 869 (8th Cir. 2011)) (emphasis added). As a result, the court concluded that the plaintiff's "attempt to recharacterize [the] standard 'admin. fee' as a fee for 'document preparation' is improper." *Id.*

Similarly, in *Washington*, class members filed an action against a lender for violations of the Missouri Second Mortgage Loan Act ("MSMLA"), alleging, *inter alia*, that the lender had charged a "document processing/delivery" fee that was impermissible

under the MSMLA. 655 F.3d at 871. The Eighth Circuit rejected the lender's argument that the fee, while denominated a "document processing/delivery" fee on the HUD-1 settlement statement, was in fact a third party document preparation fee allowable under the MSMLA, and concluded that the lender must be held "to its final HUD-1 characterization." *Id.* at 874.

Here, Appellants' HUD-1 settlement statements, in no uncertain terms, designate the allegedly illegal charges as "origination" fees. The Sturhahns' settlement statement has a line specifically labeled "document preparation," to which no fee or charge is assigned. Similarly, the Binkleys' settlement statement breaks the origination fee down into express and discrete components, none of which include document drawing, procuring or preparing. As in *Westerfeld* and *Washington*, these fee designations are final and conclusive as a matter of law as to what charges and fees were charged to Appellants in connection with their mortgage settlements.[7] *See also Whitehill*, 218

[7] Appellants could not have introduced extrinsic evidence that the fees were in fact charged for document preparation. *See Washington*, 655 F.3d at 874; *see also Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 499 (Mo. App. 2010) (rejecting defendants' argument that even though the HUD-1 settlement statements indicated that the defendant lenders charged a "loan discount," which was an impermissible fee under the MSMLA, they should have had the opportunity to present evidence that it was instead a permissible "origination fee," holding that the HUD-1s "evidenced **as a matter of law** and showed **as a matter of law**" what fees had been charged) (emphasis in original).

S.W.3d at 584-85 (whether a contract is ambiguous is a question of law, and where the language is clear and ambiguous, the terms must be defined within the four corners of the document and enforced as written). Because the trial court's construction of the parties' unambiguous contract established that there was no fee charged for the preparation or procurement of the Legal Documents, Appellants' claim that they were charged such a fee fails. The trial court's grant of summary judgment was therefore correct.

B. MISSOURI LAW DOES NOT RECOGNIZE A SEPARATE CAUSE OF ACTION FOR "PROCURING" LEGAL DOCUMENTS.

1. *Hargis* Did Not Create a Cause of Action for Procuring Legal Documents Without a Showing That Valuable Consideration Was Charged.

In an effort to avoid the dispositive fact that Respondent received no monetary consideration from Appellants for providing, drawing or procuring of legal documents, Appellants assert that this Court in *Hargis* departed from its longstanding precedent and held that when a mortgage broker buys or procures legal documents, there is no additional requirement that it charge a separate "document preparation fee." (A.B. 6-8). *Hargis* did nothing of the sort.

After examining the record to determine if the defendant, a loan broker, had participated in the "procuring" of legal documents, as that term is used in § 484.010.2, this Court in *Hargis* concluded as follows:

> In sum, the record simply does not permit a finding of any conduct by [the broker] that can be found to constitute

> procuring or assisting in drawing the note or deed of trust or playing an active role in determining the content of these documents. Neither is there evidence [the broker] charged a fee or varied its charges for their drawing by others at its behest.

Hargis, 357 S.W.3d at 583.

Thus, the *Hargis* Court applied the long-recognized two-pronged test to determine if a party has engaged in the unauthorized practice of law: (1) drawing or procuring legal documents (2) for a valuable consideration. In reaching its decision in *Hargis*, the Court referenced the long line of this Court's cases dating back to 1952 which recognized the consideration element of an unauthorized practice of law claim:

- "[T]he broker would be engaging in the unauthorized practice of law if it charged a separate fee or increased its customary charges…" *Id.* at 578;
- "[Non-lawyer employees of escrow companies] may not charge a separate fee for document preparation, or vary their customary charges…" *Id.* at 579;
- "[Non-lawyer employees of trust company] could not charge for counseling or recommending trusts or for drawing, procuring or assisting in drawing trust documents" *Id.*;
- "[N]on-attorneys could properly fill in blanks in standard real estate forms when they performed such a service without compensation…" *Id.*;
- "[F]illing in standardized forms is not the unauthorized practice of law so long as no fee is charged…" *Id.* at 582; and

- "[P]romissory notes and deeds of trust were legal documents and [the bank] engaged in the unauthorized practice of law by having non-attorneys prepare such documents for a fee." *Id.* at 579.

(internal citations omitted).

Contrary to Appellants' assertions, whether Respondent charged Appellants a separate fee or varied its customary fee with respect to legal documents utilized in the subject loan transactions is still very much an element of Appellants' claim for the unauthorized practice of law. *Hargis* neither overruled prior holdings of this Court on this issue nor eviscerated the express provisions of the Missouri statute which define the unauthorized practice of law.

Appellants, or more accurately Appellants' counsel, are not raising this faulty interpretation of *Hargis* for the first time in the instant case. For example, they have raised it in two federal district court cases that were ruled upon prior to the filing of this appeal.[8] In *Schriener v. Quicken Loans, Inc.*, Judge Perry cited *Hargis* for the proposition that "Missouri law requires that to constitute the unauthorized practice of law, non-attorneys must draw or procure documents for a valuable consideration," and further disavowed the same interpretation of *Hargis* that Appellants advance here. No. 4:12-CV-1193-CDP, 2013 WL 147842, at *2 (E.D. Mo. Jan. 14, 2013) (internal

[8] The Petition in this matter is nearly identical to the complaints filed in *Schriener v. Quicken Loans, Inc.*, No. 12-CV-1193 and *Klingel v. DAS Acquisition Co., LLC*, No. 4:12-CV-1194.

citations omitted). Similarly, in *Klingel v. DAS Acquisition Co., LLC*, No. 4:12-CV-1194-JCH, 2013 WL 490963, at *1 (E.D. Mo. Feb. 8, 2013), Judge Hamilton, relying on *Hargis* and *Eisel*, granted summary judgment in favor of the lender. The Court concluded that the plaintiffs "fail[ed] to connect the fees with any document preparation by DAS, however, as required to establish the unauthorized practice of law" and "fail[ed] to present any competent evidence tending to show that DAS varied its customary charges based on the preparation of legal documents." *Id*.

In short, Missouri law simply does not recognize a cause of action for mere procurement of legal documents without charging consideration, nor did this Court create such a cause of action in *Hargis*.

2. Considerations of Public Policy Support this Court's Conclusion that Valuable Consideration Must be Exchanged in Order for Liability to Attach for the Unauthorized Practice of Law.

If this Court were to accept Appellants' position that a Missouri-licensed attorney must draft or review every closing document, lest the parties to a mortgage transaction engage in the unauthorized practice of law, it would unnecessarily impose upon Missouri homebuyers the burden and expense of retaining legal counsel to review the closing documents – which the courts have repeatedly acknowledged as being "form" and "simple" documents. *See Hulse v. Criger*, 247 S.W.2d 855, 861 (Mo. 1952) (discussing difference between simple and complex documents, and stating that the completion of general warranty deeds, short term leases, notes, mortgages and trust deeds requires "only ordinary intelligence rather than legal training"). This would place an unnecessary and

additional expense on prospective homeowners and make home ownership more expensive. To what end?

This Court's duty "is to protect the public from being advised or represented in legal matters by incompetent or unreliable persons." *Id*. at 857-58. But here, Appellants advocate for a complete departure in the law without identifying what, if any, potential harm to consumers would be avoided as a result of the change they propose. Appellants do not argue that they have been harmed in any way by the legal documents utilized in their closings. Nor have they identified how similar homebuyers have suffered harm or face the risk of future harm as a result of a lender furnishing legal documents at a closing without charge. Consumers would not be protected; lawyers would be the only persons to benefit from such a change.

Indeed, in considering a real estate broker's preparation of standardized legal forms, this Court recognized in *Hulse* that "[s]o much real estate business is done in this way, without harmful results, that we do not think the public interest requires it to be changed." *Id*. at 861. In so holding, the *Hulse* Court aptly cited the Minnesota Supreme Court: "We do not think the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments." *Id*. at 858 (citing *Cowern v. Nelson*, 290 N.W. 795, 797 (Minn. 1940)).

C. BECAUSE APPELLANTS FAILED TO DISPUTE THAT RESPONDENT DID NOT CHARGE ANY CONSIDERATION IN EXCHANGE FOR THE LEGAL DOCUMENTS, THEY CANNOT NOW CLAIM THAT CONSIDERATION WAS EXCHANGED.

Before the trial court, Appellants did not raise a genuine dispute as to whether consideration was exchanged – whether in the form of a separate fee or by an increase in Respondent's customary charges. As a result, Appellants' newly-asserted arguments that payments unrelated to the preparation of legal documents should be construed to satisfy the consideration element are of no moment. (A.B. 8-9). Since Appellants did not raise these arguments below, they are not subject to consideration of this Court. *Barner v. The Missouri Gaming Co.*, 48 S.W.3d 46, 50 (Mo. App. 2001). Even had Appellants properly preserved their arguments regarding consideration, they are nevertheless without merit.

First, this Court has made clear that the consideration element is established if the party assessed a "separate additional charge" or if the party increased its customary charges based upon whether documents are to be prepared in the transaction. *See Eisel*, 230 S.W.3d at 339. Thus, there must be an express connection between the fee charged and the fact that legal documents were prepared. In fact, this is the exact claim Appellants alleged in their Petition. But Appellants already failed to dispute below that Respondent neither charged a separate fee nor increased its customary fees with respect to the preparation or procurement of the Legal Documents. (L.F. 28-30).

Next, Appellants argue that because Respondent paid Wolters for "completed legal documents," the consideration element is satisfied. (A.B. 10). According to

Appellants, Wolters "is deemed to be [Respondent's] agent and [Respondent] is responsible for what it paid…. Therefore, the money [Respondent] paid for the legal documents constitutes valuable consideration." (*Id.*)[9] This is a misstatement of this Court's *dicta* in *Hargis*.

In *Hargis*, the plaintiff argued that the defendant procured legal documents by purchasing them from a third party – in effect, "outsourcing" the drawing of legal documents to a third party who was acting as the defendant's agent. *Hargis*, 357 S.W.3d at 583-84. The Court acknowledged that a party can be found to have procured a document if it paid a third party to draft the document for it because the third party "would be acting as [the defendant's] agent and [the defendant] would be responsible either for directly assisting in drafting or for procuring the documents…." *Id.* at 584, fn. 9. However, the Court concluded that "[s]o far as this record shows, however, the third parties did not act as agents of JLB and JLB received no consideration for the drawing of the note and deed of trust." *Id.* First, this passage relates only to the first

[9] Appellants raised this argument for the first time in its Reply Brief in the Missouri Court of Appeals. It is well-settled that an appellant may not raise arguments in its reply that were not addressed in its opening brief or at the trial court level; accordingly, an argument raised for the first time in a reply brief does not present an issue for review. *See Kells v. Missouri Mountain Props., Inc.*, 247 S.W.3d 79, 84 n. 7 (Mo. App. 2008); *Coyne v. Coyne*, 17 S.W.3d 904, 906 (Mo. App. 2000). Nonetheless, Respondent addresses the contention herein.

element of whether the defendant drafted or procured legal documents and not to whether the defendant charged the plaintiff consideration in exchange therefor. Second, Appellants focus on the wrong transaction. What matters is whether Appellants paid for legal documents – not whether Respondent paid Wolters anything for its software.

In short, because it is undisputed that Respondent did not charge Appellants separate fees for loan documentation or vary its customary fees based on whether it provided such loan documentation, summary judgment was proper on Count I of Appellants' Petition.

II. THE COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN RESPONDENT'S FAVOR ON APPELLANTS' MERCHANDISING PRACTICES ACT CLAIM SINCE THAT CLAIM FAILS BECAUSE IT IS MERELY DERIVATIVE OF THE SAME UNAUTHORIZED PRACTICE OF LAW CLAIM FOR WHICH SUMMARY JUDGMENT WAS PROPERLY GRANTED.

Count II of Appellants' Petition incorporates by reference the general allegations set out in the Petition, as well as those additional allegations contained in Count I of the Petition. The general allegations set forth the history of the subject loan transactions, including the itemization of charges incurred in the loan process, as delineated on the HUD-1 settlement statements. Those statements establish conclusively that Appellants were not charged a separate fee for the preparation of the subject promissory notes, deeds of trust and PUD rider. The undisputed fact that no such fee was charged or paid – or that Respondent did not vary its customary fee structure based on whether legal

documents were prepared by Respondent – was dispositive of Count I of Appellants' Petition. Those same undisputed facts are also dispositive of Count II.

For the most part, Appellants' argument in support of its MMPA claim is based upon policy arguments which decry the unauthorized practice of law or unauthorized doing law business. (A.B. 15-16). Of course, the trial court found – correctly – that Respondent had not been engaged in either of those proscribed activities relative to Appellants' real estate loans.

Appellant does make an effort to buttress its MMPA claim by asserting that the use of legal documents other than those prepared by Missouri-licensed attorneys is sufficient, by itself, to support an MMPA claim. (A.B. 15). Appellants provide no judicial precedent to reinforce this conclusion. Moreover, this unsubstantiated assertion cannot overcome the fact that the MMPA claim fails for the same reason that the unauthorized practice of law claim failed.

To prevail on a claim under the MMPA, a plaintiff must allege that it "(1) purchased or leased merchandise; (2) primarily for personal, family or household purposes; (3) suffered an ascertainable loss of money or property, real or personal; and (4) as a result of the defendant's use of one of the methods or practices declared unlawful by § 407.020 R.S.Mo. § 407.025.1 R.S.Mo." *Reitz v. Nationstar Mortg., LLC*, 954 F.Supp.2d 870, 893 (E.D. Mo. 2013). That the party bringing an MMPA claim has suffered an ascertainable loss of money or property is an essential element of a cause of action brought under MMPA. *Freeman Health Sys. v. Wass*, 124 S.W.3d 504, 506 (Mo. App. S.D. 2004). Indeed, "a private cause of action [under the MMPA] is given only to

one who purchases and suffers damage." *Jackson v. Charlie's Chevrolet, Inc.*, 664 S.W.2d 675, 677 (Mo. App. 1984). Appellants quite clearly do not meet this requirement. Appellants paid nothing for the legal documents utilized in their loan transactions. Nothing. This is an undisputed fact.

Appellants alleged in Count II of their Petition that they "have been damaged in the amount of at least the amount of the improper fees or payment." (L.F. 146). Appellants have proven no such "improper fees or payment." On the contrary, the very underpinning of Appellants' claims – that they paid a fee for legal documents – has been conclusively proven to be unfounded. Count I failed as a matter of law for this reason. Count II fails for the same reason.

III. THE COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT IN RESPONDENT'S FAVOR ON APPELLANTS' UNJUST ENRICHMENT CLAIM SINCE THAT CLAIM FAILS BECAUSE IT IS MERELY DERIVATIVE OF THE SAME UNAUTHORIZED PRACTICE OF LAW CLAIM FOR WHICH SUMMARY JUDGMENT WAS PROPERLY GRANTED.

With respect to their claim for unjust enrichment, Appellants simply claim that summary judgment was improper because Respondent "engaged in the law business by procuring legal documents not from a Missouri-licensed attorney, [Respondent] has also been unjustly enriched." (A.B. 16).

Appellants' unjust enrichment claim contains the allegation that "American Equity charged Plaintiffs for services it did not perform or did not perform lawfully." (L.F.

147). The arguments raised by Appellants before the trial court during the summary judgment proceedings as well as in this Court on appeal focus on the Legal Documents utilized in the loan transactions. Appellants have maintained throughout that they were wrongfully charged a fee by Respondent for providing those Legal Documents. This allegation has been proven false. This is the only allegation that could support Appellants' unjust enrichment claim since they have put forth no other allegations in support of that claim.

An unjust enrichment claim requires pleading and proof of the following elements: "(1) a benefit conferred by a plaintiff on a defendant; (2) the defendant's appreciation of the fact of the benefit; and (3) the acceptance of the benefit by the defendant under circumstances in which retention without payment would be inequitable." *Jennings v. SSM Health Care St. Louis*, 355 S.W.3d 526, 536 (Mo. App. 2011) (internal citation omitted). The only benefit that Appellants conferred upon Respondent were the fees charged for the services provided relative to Appellants' residential loans. It certainly was not inequitable for Respondent to charge for those services. What Appellants did **not** pay for were the Legal Documents that were provided by Respondent in conjunction with those loans. Since Appellants "conferred no benefit" upon Respondent with respect to those Legal Documents, there is no basis for Appellants' unjust enrichment claim.

As with their MMPA claim, Appellants' unjust enrichment claim is based upon the exact same allegations that Appellants relied upon for their unauthorized practice of law claim. However, because those allegations regarding consideration flowing to Respondent as payment for providing Legal Documents were unfounded, thus totally

undermining their unauthorized practice of law claim, those same allegations are equally unavailing as the basis for their unjust enrichment claim.

The Federal District Court for the Eastern District of Missouri recently confirmed this point in *Schriener*. In that case, the plaintiff – who, as noted earlier, was represented by the same counsel who represent Appellants in this action – filed a petition in the same form and substance as the Petition at issue here. 2013 WL 147842 at *1. The case was removed to federal court and was thereafter dismissed with prejudice for failure to state a claim. *Id.* The plaintiff subsequently sought leave to file an amended complaint, which the Court denied, in part because the amendment would be futile. *Id.* With regard to the unjust enrichment claim, the Court noted that "[t]he inequitable circumstances alleged in … the unjust enrichment claim are that [the defendant] benefitted from a loan transaction in which the underlying documents were created without the involvement of a Missouri-licensed attorney.… This claim therefore depends on [the plaintiff] having directly paid a fee for the preparation of said documents." *Id.* at *2. The Court concluded that because that claim "is inextricably tied to the unauthorized practice claim … it fails." *Id.* Likewise, in *Klingel* (also brought by Appellants' counsel) the district court reached a similar result granting summary judgment for defendants and noting that plaintiffs' unjust enrichment claim "is inextricably tied to their unauthorized practice claim." 2013 WL 490963 at *3.

The same is true in the case at bar. Appellants' unjust enrichment claim has no basis without a showing that Respondent received a fee under circumstances that would also support their unauthorized practice of law claim. Since no such showing has been

made, Appellants' unjust enrichment claim, as set forth in Count III of their Petition, was properly disposed of by the trial court through its order granting Respondent's summary judgment motion.

CONCLUSION

Appellants have raised no substantive issues before this Court that would justify reversing the trial court's ruling on Respondent's Motion. Each of the counts of Appellants' Petition suffers from the same fatal flaw – the lack of consideration flowing to Respondent in exchange for the Legal Documents that were provided for Appellants' loans. In the absence of such evidence – which evidence Appellants acknowledged they could not produce – none of Appellants' claims could withstand summary judgment. This was confirmed by the trial court's order. Thus, based on the foregoing, Respondent American Equity Mortgage respectfully requests that the Circuit Court's Judgment be affirmed in all respects.

Respectfully submitted,

CARMODY MacDONALD P.C.

By: /s/ David P. Stoeberl
David P. Stoeberl, #46024
Tina N. Babel, #58247
Lauren M. Wacker, #62087
120 South Central Avenue, Suite 1800
St. Louis, Missouri 63105
(314) 854-8600 Telephone
(314) 854-8660 Facsimile
dps@carmodymacdonald.com
tnb@carmodymacdonald.com
lnw@carmodymacdonald.com

Attorneys for Respondent

RULE 84.06 CERTIFICATION

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that Respondent's Substitute Brief includes the information required by Rule 55.03, was prepared using Microsoft Word, in 13-point Times New Roman font and contains 7,498 words, as determined by the Microsoft Word word-counting system in compliance with Rule 84.06(b).

CARMODY MacDONALD P.C.

By: /s/ David P. Stoeberl
David P. Stoeberl, #46024
Tina N. Babel, #58247
Lauren M. Wacker, #62087
120 South Central Avenue, Suite 1800
St. Louis, Missouri 63105
(314) 854-8600 Telephone
(314) 854-8660 Facsimile
dps@carmodymacdonald.com
tnb@carmodymacdonald.com
lnw@carmodymacdonald.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of July, 2014, the foregoing was filed with the Clerk of Court electronically, to be served by operation of the Court's electronic filing system upon all parties of record.

/s/ David P. Stoeberl