

MISSOURI SUPREME COURT

Appeal No. SC 88761

James M. Finnegan,
Appellant

v.

Old Republic Title Company
of St. Louis
Respondent

Appellant's Substitute Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

POINTS RELIED ON 4

ARGUMENT 6

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 6

1. Dispute Concerning Case Facts 6

2. Dispute Concerning §486.350(1) Interpretation 8

3. Dispute Concerning Secretary of State Interpretation .. 9

4. Dispute Concerning “Official Misconduct” 14

5. Dispute Concerning Policy Behind Journal Requirement 17

6. Dispute Concerning Publicly Recorded Documents ... 18

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 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases	Pages
<i>Dickey v. Royal Banks of Missouri</i> , 111 F.3d 580 (8th Cir. 1997) . . .	16
<i>Herrero v. Cummins Mid-America, Inc.</i> , 930 S.W.2d 18 (Mo.App. W.D. 1996)	16
<i>ITT Commercial Fin. Corp. v. Mid-America Marine Supply Co.</i> , 854 S.W.2d 371 (Mo. banc 1993)	7
<i>Miller v. United Security Ins.</i> , 496 S.W.2d 871, 876 (Mo.App. 1973)	8
<i>Schwartz v. Custom Printing</i> , 926 S.W.2d 490 (Mo. App. 1996) . . .	11
<i>State ex rel. Sprint Missouri v. Public Serv. Comm'n of Missouri</i> , 165 S.W.3d 160 (Mo. banc 2005)	10
<i>State v. Biddle</i> , 599 S.W.2d 182 (Mo. banc 1980)	12
Statutes	
§486.200(6), RSMo.	17
§486.260, RSMo.	18, 19, 20
§486.350, <i>et seq.</i> , RSMo.	8, 9, 14, 16, 17, 19

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);

ITT Commercial Fin. Corp. v. Mid-America Marine Supply Co., 854 S.W.2d 371 (Mo. banc 1993);

State ex rel. Sprint Missouri v. Public Serv. Comm’n of Missouri, 165 S.W.3d 160 (Mo. banc 2005);

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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.

James M. Finnegan (“Finnegan”) primarily rests on his opening brief because Old Republic Title Company of St. Louis (“Old Republic”) has been unable to refute his argument. Finnegan will only address one factual issue and a few arguments.

1. Dispute Concerning Case Facts

The salient facts are simple and few. Old Republic charged Finnegan \$10 for notarizing 5 signatures. Three of those five signatures were filed at the Recorder of Deeds. None of the five were recorded in Old Republic’s notarial journal.

In its brief, Old Republic argues that its failure to record the five signatures in its journal is not before this Court. (Old Republic brief

at 12 n.2). It is wrong. In his petition, Finnegan alleged that “no notary public employed by Old Republic recorded the signature of Finnegan or any other class member in their notary journal.” (L.F. 7). As the movant for summary judgment, it is Old Republic’s burden to establish all facts necessary to entitle it to a verdict. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 381 (Mo. banc 1993). Unlike a motion to dismiss where all facts in the petition are always assumed true, Old Republic had the opportunity to rebut this factual allegation with evidence that it recorded the signatures in its journals. It failed to do so because, in fact, the allegation is true. Had Old Republic presented evidence that the signatures were recorded in its notarial journal, Finnegan could not have relied on its allegations in the petition but would have had to present evidence contradicting Old Republic’s evidence. *Id.* After all, “[o]n a motion for summary judgment made by defendants the facts in the petition must be taken as true, unless by admissions, depositions, and other evidence introduced, it appears beyond genuine controversy otherwise.” *Miller v. United Security Ins.*, 496 S.W.2d 871, 876 (Mo.App. 1973). Here, Old Republic presented *no* evidence on this

issue therefore Finnegan had no obligation to prove that Old Republic failed to record the signatures in its journal; he properly relied on his petition for this fact. Therefore, this fact is properly before this Court.

2. Dispute Concerning §486.350(1) Interpretation

Old Republic argues that §486.350(1), RSMo., allows it to charge \$2 per signature. That is not, however, what the statute says. The statute says that “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.) In other words, a notary may charge up to but not more than \$2 per signature that it notarizes *and* records in his journal. In this case, Old Republic did not record any signatures in its journal therefore it is not entitled to charge two dollars because it did not perform one of the two prerequisites to charge two dollars per signature. The only real issue is whether it can collect \$1 per signature under §486.350.3, RSMo., which provides that the “maximum fee in this state is one dollar for any other notarial act performed” or whether it forfeits *any* fee because it did not complete a full notarial act. Finnegan rests on his argument that the forfeiture

of any fee is the better interpretation and will not elaborate further because Old Republic failed to address this statutory interpretation issue. Regardless of this Court's conclusion concerning the \$1 versus \$0 per signature issue, Old Republic is not entitled to summary judgment because it, at most, could have collected \$5 for the five signatures that it notarized. Yet it charged \$10.

3. Dispute Concerning Secretary Of State Interpretation

Old Republic does not really substantively challenge the Missouri Secretary of State's interpretation that notaries must notarize signatures *and* record them in the journals to collect \$2 per signature. That interpretation corresponds exactly with Finnegan's interpretation and is fatal to Old Republic's case. After all, the Secretary of State is charged with regulating notaries. Its interpretation of the Notary Public Statute is entitled to great deference. "[T]he interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *State ex rel. Sprint Missouri v. Public Serv. Comm'n of Missouri*, 165 S.W.3d 160, 164 (Mo. banc 2005).

In this case, the two most recent Secretaries of State have published handbooks that instruct Missouri's notaries on all facets of their job. In plain language, the Secretaries have instructed notaries that they are allowed by law "to charge a fee of \$2.00 for each signature notarized and RECORDED IN THEIR NOTARY JOURNAL." (Capitalization in original.) (Substitute Appendix at 26.) There is no ambiguity possible. If notaries want to charge \$2.00, they must record the signature in the journal.

In vain, Old Republic attempts to distinguish the interpretation by former secretary Blunt (appearing above) from that of current Secretary Carnahan. (Old Republic's substitute brief at 20). The distinction is futile. Secretary Carnahan also instructs notaries that they are allowed by law "to charge two dollars for each signature on a document and the proper recording in the notary journal." (Substitute Appendix at 31). There is no difference between these two interpretations. To charge \$2.00 per signature, notaries must notarize the signatures and record them in the journal. There is no other way to interpret these directives. Presumably, Secretary Carnahan did not bold the recording requirement because it had been

made abundantly clear during Secretary Blunt's tenure. Regardless, the plain meaning of the interpretations is unassailable.

Rather, Old Republic is relegated to arguing that the Secretaries of State's interpretation is not properly before the Court as it is not part of the legal file. Old Republic wants this Court to ignore that the Secretaries instructed that notaries may only charge \$2 if they: 1) notarize a signature, and 2) record it in their journal.

Old Republic does not think that the Secretaries' interpretation is properly before this Court. As an abstract statement of law, Old Republic is correct that an appellate court should not generally consider *evidence* that was not presented to the trial court and included in the record on appeal. For example, in the only case that it cited, the appellate court refused to consider a party's "affidavit and notes regarding the Common Stock Agreement." *Schwartz v. Custom Printing*, 926 S.W.2d 490, 495 (Mo.App. 1996).

That situation, however, is much different from a Missouri appellate court considering a legal *interpretation* of a Missouri statute by a Missouri agency. Appellate courts routinely consider new cases and legal authority. Parties rarely rely exclusively on authorities

cited to the trial court. In fact, the only requirement that authority be cited exists at the appellate level. *Compare* Rules 55.27 and 74.04 to Rule 84.04. Finnegan’s inclusion of the Secretaries’s interpretation is no different than citing legal authority. Finnegan is simply informing the Court of an important *legal interpretation*, not introducing *new evidence*.

But even if this Court thought that Finnegan did not properly bring the interpretation before the Court, it should take judicial notice of it. For example, in *State v. Biddle*, 599 S.W.2d 182,193 n.12 (Mo. banc 1980) this Court took judicial notice of federal statutes and then went further and took “notice of the Department of Treasury, Bureau of the Mint ‘Annual Report: Calendar Year Coinage Statement 1975-1976’” *Id.* at 193 n. 14. If this Court may take judicial notice of a federal agency’s report, it may take notice of a Missouri agency’s handbook.

Old Republic’s position also encourages bad jurisprudence. Unlike many purely private cases, this case affects more people than just the parties. It affects every notary in Missouri. There are about a half dozen cases currently pending in the St. Louis County Circuit

Court that are waiting for the resolution of this appeal. Old Republic is asking this Court to turn a blind eye to the Secretary of State's position. This Court's interest is reaching the correct decision. This requires taking into account the Missouri Secretary of State's position. It defies common sense to ask that this Court not use the best tools at its disposal to make the best decision possible – especially when that decision affects many more people than just the parties to this case.

On a related issue, Old Republic claims that Finnegan violated the Rule 81.15(C) stipulation concerning the contents of the legal file because it included copies of the handbook in the appendix. This argument not only unfairly impugns Finnegan's attorney, it is flat wrong. Old Republic approved every document in the legal file. The handbooks are not part of the legal file. They are part of the appendix that allows for the inclusion of "agency rules" and "matters pertinent to the issues discussed in the brief such as ... copies of new cases or other pertinent authority." Rule 84.04(h). Documents in the appendix do not need to be part of the legal file.

4. Dispute Concerning "Official Misconduct"

Old Republic claims that it is not liable for “official misconduct” under §486.350(5), RSMo., because that statute only “states that charging more than two dollars in connection with notarizing a signature is ‘official misconduct.’” (Old Republic’s substitute brief at 14). Again, the statute says no such thing. It says that “a notary who charges more than the maximum fee specified ... is guilty of official misconduct.” §486.350(5), RSMo. As explained above, Old Republic could have properly charged either \$0 or \$5 total to Finnegan. It, however, charged him \$10. As such, Old Republic’s conduct falls squarely as “official misconduct” because it charged more than the maximum fee.

Old Republic spends three pages mischaracterizing Finnegan’s damages argument and then shows the flaws of the mischaracterized argument. (Old Republic’s substitute brief at 14-17). Finnegan believes that he was crystal clear in outlining the recovery that he seeks:

[Finnegan] has not claimed that the notaries or their employers are liable, in any way, for any deficiencies in his home purchase. 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.

(Finnegan's opening substitute brief at 14). To put it in a slightly different way, Old Republic is entitled to summary judgment if this Court concludes that it can collect \$2 per signature that it notarizes without recording the signature in the journal. If this Court concludes, however, that Old Republic is allowed to collect \$0 or \$1 per signature that it notarizes without recording the signature in the journal, then Old Republic is not entitled to summary judgment because it overcharged Finnegan by \$5 or \$10. Therefore, *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) are irrelevant to the issues in this case. Those plaintiffs were trying to undo their underlying real estate transaction and escape the legal ramifications of their transactions because of a technical error by the

notaries. The courts properly rejected those claims because the deficiencies by the notaries did not cause any problems with the underlying real estate transaction.

In contrast, Finnegan accepts the underlying transaction and its legal ramifications. He only seeks to collect the amount of the overcharge. To accept Old Republic's interpretation of *Herrero and Dickey* that "official misconduct" requires a deficiency in the underlying transaction is contrary to the plain meaning of §486.350(5) and is tantamount to saying that a notary can charge whatever he wants so long as the underlying transaction is not compromised. That is an absurd interpretation and is not supported by a fair reading of those cases. Thus, Old Republic is guilty of "official misconduct" as defined by either §486.350(5) or §486.200(6), RSMo.

5. Dispute Concerning Policy Behind Journal

Requirement.

Old Republic correctly states that Finnegan believes that one reason for requiring notaries to record signatures in their journals is to verify that no overcharges occur. (Old Republic's substitute brief at 16 n.3). Old Republic incorrectly claims, however, that simply looking

at the HUD-1 settlement statement can provide the same safeguard. A HUD-1 settlement statement tells you how much a notary charged but that is only half the picture. To determine if the charge was proper, one needs to know how many documents were notarized. That information is not available in a HUD-1 settlement statement. Therefore a HUD-1 settlement statement is an ineffective tool to ensure compliance with the limits on notary charges.

Furthermore, the idea that the Missouri Secretary of State will run around the state looking at HUD-1 statements to enforce the notary laws is absurd. The legislature has put a perfectly good tool in the Secretary's arsenal, *i.e.*, the requirement that notaries record signatures and list charges in their journal. §486.260, RSMo. That simple requirement gives the Secretary all it needs to enforce the notary laws. Old Republic should not take that tool away.

Finally, notaries public notarize signatures in more than real estate holdings. Old Republic fails to explain how the Secretary is to enforce overcharges in other scenarios. In other words, the recording of signatures in the journal is the only effective means to ensure compliance with the notary laws.

6. Dispute Concerning Publicly Recorded Documents

Finally, Old Republic makes way too much of Finnegan's not challenging the trial court's finding that "notarial acts that are publicly recorded within ninety days of execution do not need to be recorded in a notarial journal." (Old Republic's substitute brief at 20). Finnegan did not challenge this finding at the trial level or on appeal because, since 2004, §486.260, RSMo exempts from notarial journals those public records that are "publicly filed within ninety days of execution." In other words, the trial court was correct but its finding is irrelevant.

A notary need not charge anything for its services and in fact, many do not. If a notary does not charge for his services then §486.260, RSMo., is unambiguous that the signature in a public document that is publicly recorded need not appear in a journal. If a notary charges for his services then §486.350(1), RSMo., dealing with maximum charges applies and requires that the signature appear in the journal. This distinction makes sense. When notaries do not charge for their services, the only important element is that the notaries properly notarize the signatures. This can be quickly verified

by looking at the publicly-filed document. When notaries charge for their services, an additional element comes into play, i.e., did the notary overcharge the client? That cannot be verified by looking at the publicly-filed document because the price charged is not on the document. Rather, it can be verified by looking at the notarial journal that requires, among other things, that the amount of the charge appear in the journal. §486.260, RSMo. Thus, the trial court's "finding" is correct but irrelevant and Finnegan properly ignored the issue in its substitute opening brief.

The trial court's finding is also irrelevant because it cannot affect the summary judgment motion. Only three of Finnegan's documents were publicly recorded. The other two were not. (L.F. 27-29, 92-93, 119-148). Therefore, summary judgment was improper regardless of Old Republic's argument concerning publicly filed documents.

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.

Old Republic complicates a simple issue. The only argument that Old Republic raised in its summary judgment motion concerning unjust enrichment is that “it is not inequitable for Plaintiff to have been charged the appropriate amount for notary fees.” (L.F. 25). The only argument that Old Republic raised in its summary judgment motion concerning the MMPA is “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.” (L.F. 25). Therefore, Old Republic’s arguments concerning unjust enrichment and the MMPA are premised on the fact that Finnegan was charged the correct amount. Old Republic’s arguments are dependent on that factual premise. Without prevailing on this factual premise, it is not entitled to summary judgment on those counts.

Finnegan candidly admitted that “if he was not overcharged [by

Old Republic], his claim for unjust enrichment and the MMPA claim cannot survive independently.” (Finnegan’s opening brief at 15). Old Republic should recognize the same common-sense conclusion.

Rather, Old Republic admonishes Finnegan because he “has not mentioned the law or the facts in the argument ... let alone attempted to show how they interact. Nor does [Finnegan] cite any authority.” (Old Republic’s substitute brief at 24). Finnegan did not cite the law or authority because none exists for such a blatantly obvious proposition: if one’s argument is built on a factual premise, the argument falls if the factual premise is not true. To reiterate from his opening substitute brief, “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.” (Finnegan’s substitute opening brief at 16).

On the merits, Old Republic persists with its claim that “Appellant cannot recover for unjust enrichment because, given that Old Republic charged for notarization of five documents and did in fact notarize five documents, the retention of any benefit is not

inequitable.” (Old Republic’s substitute brief at 25-6). This argument ignores the central issue of this case. Did Old Republic charge the right amount? If it charged the correct amount then there is nothing inequitable in allowing it to keep the money. If it overcharged, then it would be inequitable to allow Old Republic to keep the amount of the overcharge.

The same is true for the MMPA claim. Old Republic argues that it is “neither an unfair practice nor is it deceptive to charge a person for services rendered.” (Old Republic’s substitute brief at 27). This argument ignores that Finnegan is not complaining about the quality of the work. He is solely complaining about the price. Old Republic does not cite any authority – because it defies common sense – for the proposition that charging more than one is legally entitled is not an unfair practice or a deceptive act.

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,

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MISSOURI SUPREME COURT

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OLD REPUBLIC TITLE COMPANY)		
OF ST. LOUIS, INC.)		
)		
Respondent.)		

ATTORNEY'S CERTIFICATE AND CERTIFICATE OF SERVICE

Pursuant to Rule 84.06(c), the undersigned certifies:

1. The substitute reply brief of appellant James M. Finnegan complies with the requirements of Rule 55.03.
2. The brief complies with the limitations contained in Rule 84.06(b).
3. The brief contains 3754 words, *including* the cover, table of contents, table of authorities, points relied on, and signature block, all of which are permitted to be excluded from the count.
4. Electronic copies of the brief, in both WordPerfect and Adobe PDF format, are on the enclosed floppy disk, and both the disk and the files have been scanned for viruses and are virus-free.
5. Two copies of the brief, a copy of this certificate, and a duplicate of the floppy disk filed with the Court, have been served on each of the

following named counsel of record for respondent at the following addresses
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