

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES AND OTHER AUTHORITIES	3
STATEMENT OF FACTS	5
POINTS RELIED ON	8
ARGUMENT.....	10
CONCLUSION.....	27

TABLE OF CASES AND OTHER AUTHORITIES

Cases

American Standard Ins. Co. of Wisconsin v. Bracht, 103 S.W.3d 281
(Mo.App.S.D. 2003)..... 9, 26

Associate Engineering Co. v. Webbe, 795 S.W.2d 606 (Mo.App.E.D. 1990) 25

Ballew v. Ainsworth, 670 S.W.2d 94 (Mo.App.E.D. 1984)..... 19

Beery v. Beery, 840 S.W.2d 244 (Mo.App.E.D. 1992) 24

Dickey v. Royal Banks of Missouri, 111 F.3d 580 (8th Cir. 1997)..... 8, 15, 16, 17

Herrero v. Cummins Mid-America, Inc., 930 S.W.2d 18
(Mo.App.W.D. 1996) 8, 15, 16, 17

Husch & Eppenberger, L.L.C. v. Eisenberg, 213 S.W.2d 124
(Mo.App.E.D. 2006)..... 24

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,
854 S.W.2d 371 (Mo. banc 1993) 10, 12, 21

Law Offices of Gary Green, P.C. v. Morrissey, 210 S.W.2d 421
(Mo.App.S.D. 2006)..... 9, 24

Mays-Maune & Assoc., Inc. v. Werner Bros., Inc., 139 S.W.3d 201
(Mo.App.E.D. 2004)..... 25

Powell v. State Farm Mut. Ins. Automobile Co., 173 S.W.3d 683
(Mo.App.W.D. 2005) 19

Schwartz v. Custom Printing Co., 926 S.W.2d 490 (Mo.App.E.D. 1996) 10, 17

United Pharmacal Co. of Missouri, Inc. v. Missouri Board of Pharmacy, 208 S.W.3d 907
(Mo. Banc 2006)..... 14

Weil v. Kirn, 952 S.W.2d 399 (Mo.App.E.D. 1997) 10, 22

Other Authorities

Section 486.260, RSMo. 8, 20

Section 486.350, RSMo. 8, 11, 12, 13, 14, 20

15 CSR 60-8.020 9, 25, 27

15 CSR 60-9.020 9, 27

Rule 74.04..... 6, 11, 12, 17

Rule 81.15..... 6, 18

Rule 84.04..... 5, 18, 23

STATEMENT OF FACTS

Pursuant to Rule 84.04(f), Respondent submits this Statement of Facts to set forth the complete facts in this matter.

Appellant filed his Petition against Old Republic Title Co. of St. Louis, Inc. ("Old Republic") on March 23, 2006. Legal File, p. 1, 92. Appellant's Petition sets out three separate counts – one based on the notary statutes, one based on unjust enrichment, and one based on the Missouri Merchandising Practices Act. Legal File, p. 5-13. In addition, Appellant sought to certify and represent a class. Legal File, p. 5-13.

Defendant subsequently filed its Motion for Summary Judgment on May 15, 2006, along with exhibits attached to a Statement of Uncontroverted Material Facts. Legal File, p. 1, 24-78. Among the exhibits supporting the motion were exhibits demonstrating that, among other things, (1) contrary to the allegations in the Petition, five documents were notarized in connection with Appellant's purchase of residential real estate, (2) Appellant's closing occurred as expected, without incident, (3) Appellant owned the property he closed on since the date of the closing, and (4) documents that Appellant signed in the notary's presence were publicly recorded within 90 days. Legal File, p. 27-78.

Appellant asked for and received an extension of time to respond to the summary judgment motion. Legal File, p. 2, 85-87. Appellant responded on July 3, 2006. Legal File, p. 2, 92. Appellant denied only three of the facts alleged on summary judgment by Old Republic. Legal File, p. 92-93. On appeal, however, Appellant has withdrawn his

denial of two of those three facts and now admits (1) that Old Republic notarized five documents for Appellant and (2) three of the five notarized documents were publicly recorded. App. Sub. Brief, p. 6, 8-9. The only fact Appellant now denies concerns the date the Petition was filed, an irrelevant matter. App. Sub. Brief, p. 5. Appellant set out only one additional fact in his response to the summary judgment motion.¹ Legal File, p. 93. Appellant does not cite to or rely on this fact in any fashion in its brief before this Court.

On October 30, 2006, the trial court granted Old Republic's Motion for Summary Judgment and dismissed the Petition with prejudice. Legal File, p. 149-152.

Appellant timely filed his notice of appeal and the legal file. Pursuant to Rule 81.15(c), the parties stipulated as to the documents that comprised the Legal File. In its substitute brief filed with this Court, Appellant included material in the appendix that was not before the trial court and forms no part of the record on this appeal, despite the stipulation of the parties and despite the fact that Appellant failed to place it before the trial court on summary judgment pursuant to Rule 74.04. App. Appendix, p. A-21 - A-31.

Appellant's suit is factually and legally similar to two other purported class action lawsuits concerning notary fees in which Appellant's counsel represented the Plaintiffs below. In both of those lawsuits, as in this lawsuit, judges of the Circuit Court of St. Louis County granted summary judgment against Plaintiffs. *See Rokusek v. Ticor Title*

¹ Old Republic denied the single fact alleged by Appellant. Legal File, p. 117-118.

Ins. Co., SC 88762 (appeal from J. Wiesman of the St. Louis County Circuit Court);
Rokusek v. Commonwealth Land Title Ins. Co., SC 88763 (appeal from J. Kintz of the St.
Louis County Circuit Court). Both of those lawsuits have also been transferred to this
Court after decisions by the Eastern District Court of Appeals affirming the judgments of
the trial courts.

POINTS RELIED ON

- I. The Trial Court Correctly Granted Summary Judgment to Old Republic on Count I of Appellant's Petition Because There Was No Violation of the Notary Public Statutes and No "Official Misconduct" Within the Meaning of the Statutes, in That the Notary Did Not Charge More than the Maximum Fee for the Notarizations and in That Appellant Received the Benefit of the Closing and Does Not Contest the Authenticity of His Signatures.**

Section 486.350, RSMo.

Herrero v. Cummins Mid-America, Inc., 930 S.W.2d 18 (Mo.App.W.D. 1996)

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

Section 486.260, RSMo.

- II. Although Appellant's Second Point Relied On Has Been Abandoned, Nevertheless the Trial Court Did Not Err in Granting Old Republic Summary Judgment on Appellant's Unjust Enrichment Claim and the Missouri Merchandising Practices Act Claim Because the Trial Court Correctly Decided That Independent Legal Grounds Existed to Grant Summary Judgment on Those Claims, in That There Was No Inequity Supporting a Claim for Unjust Enrichment and No Substantial Injury or Deceit Supporting a Claim under the Merchandising Practices Act.**

Law Offices of Gary Green, P.C. v. Morrissey, 210 S.W.2d 421 (Mo.App.S.D.

2006)

American Standard Ins. Co. of Wisconsin v. Bracht, 103 S.W.3d 281

(Mo.App.S.D. 2003).

15 CSR 60-8.020

15 CSR 60-9.020

ARGUMENT

I. The Trial Court Correctly Granted Summary Judgment to Old Republic on Count I of Appellant's Petition Because There Was No Violation of the Notary Public Statutes and No "Official Misconduct" Within the Meaning of the Statutes, in That the Notary Did Not Charge More than the Maximum Fee for the Notarizations and in That Appellant Received the Benefit of the Closing and Does Not Contest the Authenticity of His Signatures.

Standard of Review

When reviewing the grant of a motion for summary judgment, the appellate court's review of the trial court's decision is "essentially de novo." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.* "A trial court's entry of summary judgment will be affirmed if it is sustainable as a matter of law on any ground." *Weil v. Kirn*, 952 S.W.2d 399, 401 (Mo.App.E.D. 1997).

Appellate courts review only the record before the trial court. *See Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 495 (Mo.App.E.D. 1996) ("Because the documents were not considered by the trial court and were not made part of the record, they likewise cannot be introduced into the record on appeal.").

Argument

Count I of Appellant's Petition is based on the Missouri notary statutes contained in Chapter 486, RSMo. According to section 486.350, RSMo, the proper fee for the notarization of a signature is \$2.00. The undisputed facts relevant to Appellant's first claim are that, in connection with Appellant's purchase of residential real estate, five signatures were notarized and Appellant was charged \$10.00 – the proper fee – by Old Republic. Legal File, p. 27-78; App. Sub. Brief, p. 6, 8-9.

Appellant initially alleged that only two signatures were notarized. Legal File, p. 6-7. After the summary judgment motion was filed below, Appellant was unable to contest Old Republic's allegation of fact that five signatures were notarized and the proper amount charged by responding with discovery, exhibits, or affidavits as required by Rule 74.04. Nevertheless, Appellant vehemently denied that five documents were notarized and that summary judgment was appropriate, basing his denials primarily on arguments relating to discovery. Legal File, p. 92, 111-116.

Before this Court, Appellant now concedes that five signatures were notarized. App. Sub. Brief, p. 6, 8-9. Furthermore, Appellant does not raise any arguments based on the course of discovery. Instead, Appellant argues that a notary overcharged Appellant because it failed to record notarizations in a journal and that the overcharge constitutes

“official misconduct” for which Old Republic is liable. Appellant’s argument is not supported by statute or applicable case law.²

² Nor is Appellant’s argument supported by the record. Appellant repeatedly states in its brief to this Court that Appellant’s notarized signatures were not recorded in a journal. App. Sub. Brief, p. 9-12. However, that fact is not present in the record. Though Rule 74.04(c)(2) allowed Appellant to do so, Appellant made no allegation on

summary judgment that the notarizations were not recorded in a journal. Therefore, a supposed fact that Appellant repeatedly cites to and that underlies Appellant's entire argument is not in the record. Appellant's charge that Old Republic did not allege or prove that the notarizations were recorded in a journal misunderstands the role of a defending party moving for summary judgment. To establish a right to summary judgment, a defending party must negate **only one** of Plaintiff's elements. *See ITT Commercial Finance Corp. v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 381 (Mo. 1993). Old Republic's factual allegations and argument on summary judgment did not depend on whether the notarizations were recorded in a journal; Old Republic's arguments in favor of summary judgment were independent of that issue.

Section 486.350.1, RSMo, states 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.” Appellant reads the statute as setting forth requirements rather than a limitation. However, the statutory language does not state that a notary is required to both notarize a signature and record the notarization in a journal to receive the two dollars. The statute simply states that the most a notary can charge for notarization of a signature is \$2.00, and the notary cannot increase that maximum amount by bundling it with another action, such as recording the notarization in a journal. Appellant cites nothing other than the statutory language itself in support of the argument that failing to record a notarization in a journal prohibits any charge for a notarization, but the reading urged by Appellant requires the statute to mean more than it says.

The trial court correctly denied Appellant's argument concerning the meaning of section 486.350.1, RSMo. The court stated that “Section 486.350.1 by its express terms simply prohibits a notary for charging extra for recording the notarial act in a journal over and above the \$2.00 charge for the notarial act itself. The section does not, as Plaintiff suggests, make both a notarial act and the recording in a journal a prerequisite for any charge.” Legal File, p. 149 (footnote 1). The undisputed facts in this case are that Old Republic charged \$10.00 for the notarization of five signatures. Legal File, p. 27-78; App. Sub. Brief, p. 6. Therefore, Old Republic did not charge over \$2.00 for the notarization of each signature and did not violate any statute.

Respondent's reading of section 486.350.1 and the trial court's reading of that section, namely, that the section prohibits charging more than \$2.00 for both authenticating the signature and recording in a journal, is consistent with other portions of the notary statutes. Section 486.350.6 shows an intent by the legislature to make sure that extra fees are not impermissibly charged for bundled services, in that case notarization plus travel fees. Furthermore, Respondent's reading is consistent with section 486.370, which sets forth criminal liability for a notary engaged in "official misconduct." It is black letter law that the rule of lenity should be applied to civil statutes where violation of the civil statute also has penal consequences. *See United Pharmacal Co. of Missouri, Inc. v. Missouri Board of Pharmacy*, 208 S.W.3d 907 (Mo. banc 2006). Even if Appellant's reading of section 486.350.1 is plausible, this Court should apply the rule of lenity such that technical deficiencies by a notary that do not relate to the authenticity of the signature are not considered criminal acts.

In addition to the fact that Appellant's reading of section 486.350.1 reads more into the statute than the statute says, Appellant cites to no law that suggests that a failure to record a notarial act in a journal is "official misconduct" of the type that subjects the notary's employer to liability. Notably, section 486.350 does **not** state that failing to record the notarization in a journal is "official misconduct." Rather, it states that charging more than two dollars in connection with notarizing a signature is "official misconduct." Section 486.350.5, RSMo. Nor does Appellant cite any case law that states that charging a fee when the notarizations have not been recorded in a journal is "official misconduct"

for which Old Republic, the notary's employer, is liable. In fact, the two cases to consider the scope of "official misconduct" under Missouri law state that technical deficiencies in the notarization of a signature are not "official misconduct" and do not give rise to any damages under the notary statutes.

In *Herrero v. Cummins Mid-America, Inc.*, 930 S.W.2d 18 (Mo.App.W.D. 1996), the Missouri Court of Appeals considered whether a notary's employer was liable for the notary's alleged official misconduct. The Court of Appeals affirmed the trial court's entry of summary judgment in favor of the notary's employer. See *Herrero*, 930 S.W.2d at 21-22. The *Herrero* court recognized that "[t]he rationale for notarization is to avoid the risk that the signature will not be authentic. Thus, the notary's duty is to acknowledge the authenticity of the signature." *Id.* at 22. The court concluded that where that rationale and duty – the rationale and duty that is the basis for the notary statutes – was not at issue because there is no claim that the notarized signature was not authentic, there was no action on the part of a notary that can arise to "official misconduct." *Id.* ("Because the plaintiff here did not dispute the genuineness of her signature, Lockhart did not commit official misconduct, which would subject her to liability....").

Dickey v. Royal Banks of Missouri, 111 F.3d 580 (8th Cir. 1997), a case applying Missouri law, follows the decision in *Herrero*. Again the claim before the court concerned a technicality related to the notarization of a signature that was claimed to amount to "official misconduct." In rejecting this claim, the appellate court held that where the authenticity of a signature is not challenged, as a matter of law there can be no

“official misconduct” for which there is liability. The *Dickey* court specifically noted that there was no reported case in which “a notary was held liable in a situation where the notarization was technically deficient but the signature was authentic.” *Dickey*, 111 F.3d at 584. In sum, the *Dickey* and *Herrero* courts both recognize that “official misconduct” only encompasses acts that are more than a technical deficiency unrelated to the authenticity of the signature, because the notary statutes are meant only to create liability for damages that arise from a failure to fulfill the duty of a notary, which is to acknowledge that a signature is authentic.

In this case there is no dispute that Appellant's notarized signatures are authentic and, just as importantly, no damages resulting from a signature that is not authentic. Appellant can make no showing of such damages because he closed on his residential property as expected and has owned and enjoyed the property since that date, as the trial court recognized. Legal File, p. 150-151. Therefore, there is no damage in this case that relates in any way to any purpose served by recording a notarial act in a journal.³

³ Appellant has previously intimated that the purpose of a notary journal is to

Recognizing that the *Herrero* and *Dickey* cases are fatal to his argument, Appellant now asserts, though he did not make the assertion before the trial court, that there are two different acts of official misconduct in this case: an alleged overcharge and, *independent of any overcharge*, the failure to record the notarizations in a journal. App. Sub. Brief, p. 12-13. However, Appellant concedes that the only potential damages in this case is the charge for the notary services themselves. App. Sub. Brief, p. 8-9. The undisputed facts in the record demonstrate that Appellant has not been damaged in any other way because he successfully closed on his house and has owned it since. Therefore, to the extent Appellant is arguing that there is “official misconduct” independent from the alleged

verify that no overcharge occurred with respect to a notarial act. However, as Appellant’s counsel conceded in oral argument before the Court of Appeals in this matter, in the circumstances presented in this case evidence concerning an alleged overcharge is easily provided by offering the HUD-1 settlement statements or by simply asking a plaintiff what he or she was charged.

overcharge, there are no damages for which Appellant can recover. Damages are a required element for recovery under the notary statutes. *See Herrero*, 930 S.W.2d at 22. Therefore, Appellant's argument fails.

Appellant also attempts to buttress his argument by including in the Appendix to Appellant's substitute brief two documents entitled "Document Certification Services" and "Missouri Notary Handbook." Neither document was placed before the trial court by Appellant. They were not attached as exhibits to any pleading filed by Appellant nor otherwise offered to the trial court on summary judgment or at any other time. Documents that were not presented to the trial court pursuant to Rule 74.04, were not considered by the trial court, and were not part of the record cannot be introduced into the record on appeal. *See Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 495 (Mo.App.E.D. 1996). Furthermore, the attempt to insert the documents into the record is improper because it violates the stipulation entered into by the parties pursuant to Rule 81.15(c) as to the documents that make up the record in this case⁴ and because the

⁴ Appellant contacted counsel for Old Republic to request that Old Republic stipulate as to the Legal File. After communications between the parties concerning the documents that should form the record, Old Republic entered into the stipulation at Appellant's request. Appellant never requested to make the "Document Certification Services" document and "Missouri Notary Handbook" document a part of the record and withheld it until this case was already on appeal, and in the case of the "Missouri Notary

documents are not proper material for an appendix. *See* Rule 84.04(h).

Appellant has previously attempted to remedy his failure to include these two documents in his summary judgment pleadings by arguing that (1) the documents are legal interpretations that are properly cited to and (2) the Court may take judicial notice of the documents. Both arguments are incorrect. With respect to the argument that the documents are legal interpretations, Appellant can cite to no case concerning review of summary judgment that holds that a party that loses summary judgment may make an argument for the first time on appeal by making reference to a document that was not presented to the trial court. Nor can Appellant cite to any case that suggests that the documents are interpretations arrived at by the Secretary of State made after a full administrative hearing based on substantial and competent evidence on the whole record on a subject that is within the administrative agency's particular expertise. The Secretary of State's Office has no particular expertise with respect to statutory interpretation. In fact, it is the judiciary that has the expertise in that respect.

Appellant next argues that the Court should take judicial notice of the two new documents. The Court should not do so. Missouri law is clear that Missouri courts do not take judicial notice of administrative rules or regulations unless they have been published in the Code of State Regulations. *See Powell v. State Farm Mut. Ins.*

Handbook," until the case was before this Court.

Automobile Co., 173 S.W.3d 685 (Mo.App.W.D. 2005); *Ballew v. Ainsworth*, 670 S.W.2d 94 (Mo.App.E.D. 1984). The Secretary of State's rules and regulations concerning notaries are found at 15 CSR 30-100. Neither the document "document certification information" nor the document "Missouri Notary Handbook" is published there. Therefore, the Court should not take judicial notice of the documents.

Finally, even if the two documents newly offered by Appellant were part of the record on summary judgment, they do not support Appellant's statutory interpretation. Previously, Appellant relied only on the "Document Certification Services" document produced by a former Secretary of State. Appellant continues to quote this later document to this Court, pointing out the emphasis placed in that document on recording a notarial act in a notary journal. App. Sub. Brief, p. 11. However, the later "Missouri Notary Handbook" document, produced by the current Secretary of State, does not contain the same language or emphasis concerning section 486.305, RSMo, as the earlier document. App. Appendix, p. A-26, A-31. The current "Missouri Notary Handbook" simply restates the language of section 486.305, RSMo, which merely prohibits a notary from charging extra for recording the notarial act in a journal over and above the \$2.00 charge for the notarial act itself. App. Appendix, p. A-31 ("Section 486.350, RSMo, allows a notary to charge two dollars for each signature on a document and the proper recording of the notarization in their journal."). This amendment to the document produced by the Secretary of State suggests, if anything, that any emphasis previously placed on recording in a notary journal as it relates to charging a \$2.00 notary fee has

been deleted because it was not founded on the statutory language found in section 486.305.

Finally, it is worth noting that by limiting his argument to an alleged overcharge related to a notary journal, Appellant does not challenge the trial court's grant of summary judgment on Count I of the Petition in its entirety. That is, Appellant now contends that it was the failure to record the notarizations in a journal that suggests that there is an "overcharge" for which Appellant can recover. However, as the trial court found in its Judgment, section 486.260, RSMo, states that notarial acts that are publicly recorded within ninety days of execution do not need to be recorded in a notary journal. Legal File, p. 150. The undisputed fact before the trial court was that three of the five signatures of Appellant were publicly recorded within ninety days of execution. Legal File, p. 27-78. Appellant continues to concede that fact on this appeal (App. Sub. Brief, p. 6) and, furthermore, makes no challenge before this Court concerning the trial court's finding that the notary statutes do not require that the notarization of those three signatures be recorded in a journal. Therefore, even if this Court accepts every single one of the arguments presented by Appellant on appeal, still the grant of summary judgment with respect to three out of the five signatures at issue should be affirmed.

For all of the reasons set out above, the grant of summary judgment in favor of Old Republic should be affirmed.

II. Although Appellant's Second Point Relied On Has Been Abandoned,

Nevertheless the Trial Court Did Not Err in Granting Old Republic Summary Judgment on Appellant’s Unjust Enrichment Claim and the Missouri Merchandising Practices Act Claim Because the Trial Court Correctly Decided That Independent Legal Grounds Existed to Grant Summary Judgment on Those Claims, in That There Was No Inequity Supporting a Claim for Unjust Enrichment and No Substantial Injury or Deceit Supporting a Claim under the Merchandising Practices Act.

Standard of Review

When reviewing the grant of a motion for summary judgment, the appellate court’s review of the trial court’s decision is “essentially de novo.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). “The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially.” *Id.* “A trial court’s entry of summary judgment will be affirmed if it is sustainable as a matter of law on any ground.” *Weil v. Kirn*, 952 S.W.2d 399, 401 (Mo.App.E.D. 1997).

Argument

Appellant argues that “there is no way that Old Republic can win” with respect to Appellant’s claims for unjust enrichment and violation of the Missouri Merchandising Practices Act unless Old Republic also “wins” on the notary public statutory claim. App. Sub. Brief, p. 15-16. Appellant is incorrect. Appellant’s three claims are not legally

interdependent; they are based on entirely different statutory and case law. Old Republic argued each count separately on summary judgment, focusing on the inequitable retention element of unjust enrichment and the statutory definitions of “unfair practice” and “deception” in the Missouri Merchandising Practices Act and related administrative rules. Furthermore, the trial court recognized the legal distinctions between the claims and found against Appellant on legal grounds that are entirely separate from the grounds it set out with respect to Appellant’s claim based on the notary statutes. Appellant’s failure to address all of its claims before this Court and challenge the findings of the trial court with respect to each claim effectively abandons its appeal with respect to the unjust enrichment and merchandising practices claims.

A. Appellant Has Abandoned His Claims in this Appeal Relating to Unjust Enrichment and the Missouri Merchandising Practices Act.

The argument related to Appellant’s Point Relied On II is approximately one page, though it concerns two counts of the Petition and two separate legal claims.⁵ The argument does not state the legal reasons for the Appellant’s claim of reversible error as

⁵ Appellant’s Point Relied On II violates Missouri Rule of Civil Procedure 84.04 for the separate reason that it groups together multiple contentions and multiple legal issues. *See Law Office of Gary Green, P.C. v. Morrissey*, 210 S.W.3d 421, 424 (Mo.App.S.D. 2006).

required by Rule 84.04. The argument contains no mention of the trial court's order at all.

There is no citation to any authority, not even the elements of a claim for unjust enrichment nor the statutes and administrative rules making up the Missouri Merchandising Practices Act, though those are the legal basis for Appellant's claims. There is no mention of the facts in the record nor any attempt to relate the facts in the record to the statutes and case law that concern unjust enrichment and the Missouri Merchandising Practices Act.

Under these circumstances, Appellant has abandoned this Point Relied On and the claims related to it. Where a short argument fails to state the rationale for the claim of error and fails to provide supporting authority, the argument has not been developed and is, therefore, abandoned. *See Husch & Eppenberger, L.L.C. v. Eisenberg*, 213 S.W.2d 124, 134 (Mo.App.E.D. 2006); *Beery v. Beery*, 840 S.W.2d 244, 246 (Mo.App.E.D. 1992). Furthermore, where argument fails to show how the principles of law and the facts of the case interact, the point relied on is abandoned. *See Law Offices of Gary Green, P.C. v. Morrissey*, 210 S.W.2d 421, 426 (Mo.App.S.D. 2006). Appellant has not mentioned the law or the facts in the argument on his second Point Relied On, let alone attempted to show how they interact. Nor does Appellant cite any authority. For these reasons alone the grant of summary judgment should be affirmed.

- B. The Record on Appeal and the Legal Standards That Relate to Appellant's Claims Based on Unjust Enrichment and the Merchandising Practices Act

Support the Trial Court's Grant of Summary Judgment Against Appellant.

Even if Appellant has not abandoned his second Point Relied On, nevertheless the grant of summary judgment should be affirmed. Appellant cites no law for the argument made in his second Point Relied On that claims based on the notary statutes, unjust enrichment, and the Missouri Merchandising Practices Act rise or fall together because they are subject to the same legal standards. Nor could Appellant do so, given that different statutes and elements apply to each cause of action.

The trial court correctly recognized in its order that different law applied to the claims for unjust enrichment and claims based on the merchandising practices statutes. Furthermore, the trial court explicitly found that even if the notary statutes had defeated summary judgment on Appellant's Count I, nevertheless summary judgment would have been granted on the other counts. Legal File, p. 151-152 ("Even if Plaintiff had been overcharged \$10.00 – which he was not – that is not a 'substantial' injury required for an unfair practice by the Merchandising Practices Act. *See* 15 CSR 60-8.020(1)."). As set forth below, the trial court was correct in its legal findings. Therefore, its grant of summary judgment should be affirmed.

Count II of Appellant's Petition is entitled "Unjust Enrichment." The elements of a claim for unjust enrichment are a benefit conferred upon the defendant by the plaintiff, appreciation of the fact of such benefit by the defendant, and acceptance and retention of the benefit by defendant under circumstances in which retention would be inequitable.

See Mays-Maune & Assoc., Inc. v. Werner Bros., Inc., 139 S.W.3d 201, 205 (Mo.App.E.D. 2004). The most “significant” of the three elements is the element concerning whether retention of the benefit is inequitable. *See Associate Engineering Co. v. Webbe*, 795 S.W.2d 606, 608 (Mo.App.E.D. 1990).

Appellant no longer contests the fact that Old Republic charged for and did notarize five documents for him. App. Sub. Brief, p. 5-6, 8 (footnote 1). Therefore, as a matter of law, 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. Appellant paid for the notarization of five documents related to his residential real estate purchase. Legal File, p. 27-28. As a result, and as Appellant expected, he successfully closed on his property. Legal File, p. 28. Furthermore, Appellant still owns and enjoys the property that he purchased. Legal File, p. 10. “There can be no unjust enrichment if the parties receive what they intended to obtain.” *American Standard Ins. Co. of Wisconsin v. Bracht*, 103 S.W.3d 281, 293 (Mo.App.S.D. 2003). Entirely independent of an alleged technical failure to record a notarization in a journal, it is not inequitable for Old Republic to retain the minimal charge made to Appellant given the context of the entire transaction, in which Appellant received the property he intended to receive.

Appellant, in Count III of his Petition, alleges that overcharging for notary fees is a “deception” and “an unfair practice” pursuant to the Missouri Merchandising Practices Act, § 407.010, RSMo, et seq. The term “unfair practice” is defined by rule as:

An unfair practice is any practice which –

(A) Either –

1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or

2. Is unethical, oppressive or unscrupulous; and

(B) Presents a risk of, or causes, substantial injury to consumers.

See 15 CSR 60-8.020(1). The term “deception” is defined by rule as “any method, act, use, practice, advertisement or solicitation that has the tendency or capacity to mislead, deceive or cheat, or that tends to create a false impression.” *See* 15 CSR 60-9.020(1).

It is neither an unfair practice nor is it deceptive to charge a person for services rendered. In this case, Appellant paid for the notarization of five documents related to his residential real estate purchase and five documents were notarized. Legal File, p. 27-28. Appellant successfully closed on his property. Legal File, p. 28. Furthermore, Appellant still owns and enjoys the property that he purchased. Legal File, p. 28. Therefore, Appellant has not suffered any injury, let alone the “substantial” injury required by the definition of “unfair practice” set out in 15 CSR 60-8.020(1). Furthermore, Appellant has not been cheated, misled, or deceived. It is important to note that Appellant did not offer any evidence whatsoever in response to Old Republic’s motion for summary judgment concerning a capacity to mislead, deceive, or cheat despite requesting and receiving an extension of time to respond to summary judgment. Legal File, p. 84-87. Therefore,

given the record in this case, Appellant as a matter of law cannot recover pursuant to his
Count III.

Conclusion

WHEREFORE, for all of the reasons set out above, the trial court's decision to
grant summary judgment in favor of Old Republic Title Co. of St. Louis, Inc. should be
affirmed.

Respectfully submitted,

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Required Certifications and Certificate of Service

Pursuant to Rules 84.06(c) and 84.06(g), the undersigned certifies that:

1. This brief includes the information required by Rule 55.03;
2. This brief complies with the limitations contained in Rule 84.06(b);
3. This brief contains approximately 5885 words;
4. The electronic copies of this brief are contained on a disk that has been

scanned for viruses and is virus free; and

5. Two copies of this brief and a duplicate of the disk containing an electronic copy of this brief have been served on this 6th day of November, 2007, by mailing them via U.S. Mail, first class postage pre-paid, to:

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APPENDIX

15 CSR 60-8.020 A-1
15 CSR 60-9.020 A-2

The judgment appealed from and the notary statutes contained in Chapter 486, RSMo, have been included in the Appendix submitted with Appellant’s Substitute brief.