

MISSOURI SUPREME COURT

Appeal No. SC 88763

Lisa L. Rokusek
Jennifer Human,
Appellants,

v.

Commonwealth Land Title
Insurance Company
Respondent

Appellants' Substitute Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

JURISDICTIONAL STATEMENT 6

STATEMENT OF FACTS 7

POINTS RELIED ON 9

ARGUMENT 11

I. The trial court erred in granting Commonwealth’s summary judgment motion on the violation of the Missouri Notary Public Statute claim because Commonwealth’s notaries committed official misconduct in charging \$12 for notarizing six signatures that they failed to record in their journal in that the Missouri Notary Public Statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in their journal 11

II. The trial court erred in granting Commonwealth’s summary judgment motion on plaintiffs’ common law unjust enrichment claim because that common law claim is not preempted by the Missouri Notary Public Statute in that there is no requirement that common law liability preexist statutory liability to escape

preemption, and even if that proposition were true, notaries public had common law liability that predated the Missouri Notary Public Statute 17

III. The trial court erred in granting Commonwealth’s motion to dismiss the Missouri Merchandising Practices Act (“MMPA”) claim because Commonwealth provided no evidence that it was exempt from the MMPA in that it did not prove that it was under the direction and supervision of the Department of Insurance 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases	Pages
<i>Bosch v. St. Louis Healthcare Network</i> , 41 S.W.3d 462 (Mo. banc 2001)	23
<i>Clapp v. Miller</i> , 156 P. 210 (Okla. 1916)	21
<i>Dickey v. Royal Banks of Missouri</i> , 111 F.3d 580 (8th Cir. 1997)	17
<i>Figures v. Fly</i> , 193 S.W. 117 (Tenn. 1916)	21
<i>First Bank of Childerburg v. Florey</i> , 676 So.2d 324 (Ala. Civ. App. 1996)	21
<i>Gales v. Weldon</i> , 282 S.W.2d 522 (Mo. 1955)	20
<i>Herrero v. Cummins Mid-America</i> , 111 F.3d 580 (8th Cir. 1997)	17
<i>In re Sapp</i> , 91 B.R. 520 (Bankr. E.D. Mo. 1988)	17
<i>In Re Thigpen v. Matrix Financial Services</i> , No. 02-1428MAM13, 2004 Bankr. LEXIS 1135 (Bankr. S.D. Ala. May 25, 2004)	21
<i>Independence Leasing v. Aquino</i> , 445 N.Y.S.2d 893 (N.Y. Civ. Ct. 1981)	21
<i>J.S. v. Beard</i> , 28 S.W.3d 875 (Mo. banc 2000)	14
<i>Jefferson County Fire Protection Dis't. v. Blunt</i> , 205 S.W.2d 866 (Mo. banc 2006)	11
<i>Kirk Corp. v. First American Title Co.</i> , 220 Cal.App.3d 785 (1990)	17

State ex rel. Workingmen’s Banking Co. v. Edmunds,

66 Mo. App. 47 (Mo.App. 1896) 22
Statutes

§486.200, *et seq.*, RSMo. 16-17, 19

§486.350, *et seq.*, RSMo. 13-15, 16

Other Authorities

Close & Dixon, Notaries Public From the Time of the Roman

Empire to the United States Today, and Tomorrow,

68 N.D.L. Rev. 873 (1992) 21

JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

The trial court decided this case by granting a motion to dismiss on one count and granting summary judgment to the defendant, Commonwealth Land Title Insurance Company (“Commonwealth”) on the other two counts. (L.F. 153). Lisa Rokusek and Jennifer Human (collectively the “plaintiffs”) admitted to all of Commonwealth’s relevant statements of uncontroverted facts in its summary judgment motion. (L.F. 151-152). As such, there should be no disputes about the facts.

On March 28, 2006, plaintiffs filed a three count petition against Commonwealth. (L.F. 1). The petition had three counts: violation of the Missouri Notary Public Statute, unjust enrichment, and violation of the Missouri Merchandising Practices Act. (L.F. 5-14). All three counts share the same basic facts. Plaintiffs, on their own behalf and on behalf of all others similarly situated, alleged that they refinanced their home and that Commonwealth provided the notary public services at the closing of the refinance. Plaintiffs alleged that because Commonwealth did not do everything required by the Missouri Notary Public Statute necessary to earn a \$2 per signature fee, it overcharged them. (L.F. 5-14).

The only facts material to this appeal are that Commonwealth notarized six signatures and charged plaintiffs \$12. (L.F. 115-116, 151-152).

And that Commonwealth did not record any of the signatures in the notarial journal. (Id.)

POINTS RELIED ON

- I. The trial court erred in granting Commonwealth's summary judgment motion on the violation of the Missouri Notary Public Statute claim because Commonwealth's notaries committed official misconduct in charging \$12 for notarizing six signatures that they failed to record in their journal in that the Missouri Notary Public Statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in their journal.

Herrero v. Cummins Mid-America, 111 F.3d 580 (8th Cir. 1997);

In re Sapp, 91 B.R. 520 (Bankr. E.D. Mo. 1988);

J.S. v. Beaird, 28 S.W.3d 875 (Mo. banc 2000);

Jefferson County Fire Protection Dis't. v. Blunt, 205 S.W.2d 866 (Mo. banc 2006).

- II. The trial court erred in granting Commonwealth's summary judgment motion on plaintiffs' common law unjust enrichment claim because that common law claim is not preempted by the Missouri Notary Public Statute in that there is no requirement that common law liability preexist statutory liability to escape preemption, and even if that proposition were true, notaries public had common law liability that predated the Missouri Notary Public Statute.

Gales v. Weldon, 282 S.W.2d 522 (Mo. 1955);

First Bank of Childerburg v. Florey, 676 So.2d 324 (Ala. Civ. App. 1996);

In Re Thipgen v. Matrix Financial Services, No. 02-1428MAM13, 2004 Bankr. LEXIS 1135 (Bankr. S.D. Ala. May 25, 2004);

State ex rel. Workingmen's Banking Co. v. Edmunds, 66 Mo. App. 47 (Mo.App. 1896).

III. The trial court erred in granting Commonwealth's motion to dismiss the Missouri Merchandising Practices Act ("MMPA") claim because Commonwealth provided no evidence that it was exempt from the MMPA in that it did not prove that it was under the direction and supervision of the Department of Insurance.

Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462 (Mo. banc 2001).

ARGUMENT

I. The trial court erred in granting Commonwealth's summary judgment motion on the violation of the Missouri Notary Public Statute claim because Commonwealth's notaries committed official misconduct in charging \$12 for notarizing six signatures that they failed to record in their journal in that the Missouri Notary Public Statute prohibits notaries from charging, maximum, more than \$1 per notarized signature that was not recorded in their journal.

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

Plaintiffs alleged that Commonwealth overcharged them for notary fees because notaries can only be paid \$2 per signature if they notarize the

signature *and* record it in their journal.¹ Commonwealth admitted that it notarized six signatures but did not record any in its journal. As such, the \$12 fee that Commonwealth charged was excessive because, as will be explained below, that absolute maximum that Commonwealth could have charged was \$1 signature for a total of \$6.

Commonwealth initially pointed to §486.360, RSMo., which requires that the employer consent to the notary's misconduct before liability can attach to the employer. From there, it concluded that it was entitled to summary judgment because "[p]laintiffs have no evidence to support an allegation that Commonwealth consented to the notary public not keeping a journal." (L.F. at 120).

Commonwealth confused plaintiffs' obligations in *opposing* Commonwealth's summary judgment motion with plaintiffs' non-existent obligation to *support* a motion for summary judgment that it did not file. Plaintiffs did not move for summary judgment and are under no obligation to prove *any* part of its case. They merely had to defeat Commonwealth's motion for summary judgment. It was Commonwealth's burden to prove that

¹ Plaintiffs' petition also alleged that there were an insufficient number of signatures notarized by Commonwealth to support its fee even if it were allowed to charge \$2 per signature. That issue is not on appeal.

it did not consent to the notary's official misconduct if it wanted summary judgment on this point. It failed to present *any* evidence on this issue. In fact, Commonwealth's argument was disingenuous because it convinced the trial court to stay discovery (including answering an interrogatory asking whether Commonwealth consented to the notary's acts) thus barring an inquiry into this very issue. (L.F. 107).

Commonwealth then argued that it did not commit "official misconduct" because §486.350, RSMo, defines "official misconduct" as "charging more than the maximum fee specified" but does not define "official misconduct" as failing to record a signature in a journal. This argument merely begs the question: What is "charging more than the maximum fee specified?" If the statute requires the notary to notarize the signature *and* to record the signature to collect its fee and the notary does not record the signature, the notary has collected "more than the maximum fee specified." So, does the statute require a notary to record the signature to collect a \$2 per signature fee?

The answer to this question appears from the plain and unambiguous meaning of the statute. In relevant part, §486.350, RSMo., states:

1. The maximum fee in this state for notarization of each signature *and the proper recording thereof in*

the journal of notarial acts is two dollars for each signature notarized.” (Emphasis added.)

3. The maximum fee in this state is one dollar for any other notarial act performed.

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

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

The undisputed facts are that Commonwealth charged \$12 for notarizing six signatures but none were recorded in the notary journal.

The legal issue is whether Commonwealth overcharged the plaintiffs. The language in §486.350(1), RSMo. is plain and unambiguous. Notaries must do *two* things to charge a \$2 per signature fee. First, they must

notarize a signature. Second, they must record the signature in their journal. If they do not perform these two acts they cannot charge a \$2 per signature fee. Commonwealth has conceded that none of the signatures were recorded in journals. (L.F. at 116). Therefore, it cannot collect \$2 per signature.

This interpretation is consistent with the views of the relevant administrative agency. The Missouri Secretary of State issued a “Document Certification Services” handbook to assist notaries in performing their duties. This handbook not only outlined the two obligations appearing above, it emphasized that *both* obligations must be met to collect two dollars: “The notary is allowed by law to charge a fee of \$2.00 for each signature notarized and RECORDED IN THEIR NOTARY JOURNAL.” (Capitalization in original.) (Appendix at 25.) This interpretation has been consistently held by whomever has been elected Secretary of State. (Appendix at 30.)

The only real issue is whether Commonwealth can collect \$1 per signature under §486.350(2), RSMo., or are instead precluded from charging anything. Under either scenario, the trial court improperly granted summary judgment because, at maximum, it could have charged \$6 for notarizing six signatures but it charged \$12.

Section 486.350(3), RSMo., allows notaries to charge one dollar for “any other notarial act performed.” The \$1 charge for “any other notarial act

performed” in §486.350(3), RSMo., is reserved for notarial acts other than notarizing signatures. Subsections one and two of this statute apply to notarizing signatures thus the reference in subsection three to “other” acts must refer to things other than notarizing signatures. For example, notaries may take acknowledgments, administer oaths and affirmations, and certify that a copy of a document is a true copy of another document. §486.250, RSMo. Those are the acts that fall within the realm of the \$1 charge in §486.350(3), RSMo. Performing an incomplete act, like Commonwealth in this case, is not the type of act that subsection three contemplates. It would create an incentive for notaries not to comply with the journal recording requirement. That could not have been the intent of the legislature. Thus, Security Title was not entitled to charge anything for its incomplete acts. Because Commonwealth’s notaries overcharged the plaintiffs, they committed “official misconduct” under § 486.350(5), RSMo., because “a notary who charges more than the maximum fee specified ... is guilty of official misconduct.”

Furthermore, Commonwealth’s argument also ignores that the definition of “official misconduct” is not restricted to §486.350(5), RSMo. In fact, the definition portion of the Notaries Public Act also defines “official misconduct.” Section 486.200(6), RSMo, provides that “[a]s used in sections

486.200 to 486.405 ‘official misconduct’ means the wrongful exercise of a power or the wrongful performance of a duty. The term ‘wrongful’ as used in the definition of official misconduct means unauthorized, unlawful, abusive, negligent, reckless, or injurious.” Therefore, charging more than the maximum fee is one type of official misconduct but so is the unauthorized, unlawful or injurious exercise of a power or performance of a duty. Failure to record signatures in a journal, as required by law to earn a \$2 per signature fee, is unauthorized, unlawful and injurious and thus it is also official misconduct.

Commonwealth cited a few cases where federal and state courts discuss “official misconduct.” None help Commonwealth. In *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), *In re Sapp*, 91 B.R. 520 (Bankr. E.D. Mo. 1988), and *Kirk Corp. v. First American Title Co.*, 220 Cal.App.3d 785 (1990) plaintiffs sued notaries public because the notaries failed to notarize the plaintiffs’ signatures in their presence or failed to record the signatures in journals, contrary to the law. The plaintiffs were attempting to escape the legal ramifications of the notarized documents. The plaintiffs, however, never disputed the authenticity of their signatures and, in *Herrero*, affirmatively consented to the notary notarizing the signature

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

Unlike those cases, plaintiffs are not attempting to undo any part of their real estate transaction or escape the legal ramifications of the documents. They have not claimed that the notaries or their employers are liable, in any way, for any deficiencies in the home purchasing or refinancing process. They are simply claiming that Commonwealth illegally overcharged them for the notarial services. The harm that they suffered (overpaying for notarial fees) exactly match the relief they are seeking, *i.e.*, the amount that they were overcharged. Commonwealth's fatal error is failing to distinguish the disconnect between harm suffered by the plaintiffs in the cases they cite and remedy sought by those same plaintiffs from the perfect parallel between the harm suffered by Rokusek and Human and the remedy that they seek.

Therefore, the trial court erred in granting Commonwealth's motion for summary judgment.

II. The trial court erred in granting Commonwealth's summary judgment motion on plaintiffs' common law unjust enrichment claim because that common law claim is not preempted by the Missouri Notary Public Statute in that there is no requirement that common law liability preexist statutory liability to escape preemption, and even if that proposition were true, notaries public had common law liability that predated the Missouri Notary Public Statute.

Commonwealth contends that plaintiffs' unjust enrichment claim (count II) fails because it is preempted by the Missouri Notary Public Statute, §486.200, *et. seq.* The trial court's order does not state whether it entered judgment on this count based on preemption or because there can be no unjust enrichment if Commonwealth did not overcharge for its services. (L.F. 114). Plaintiffs will only address the preemption issue here as it has already addressed the proper charge issue in Point I.

Commonwealth argues that the common law unjust enrichment claim is preempted by the statute because notary public liability did not preexist the statute. There are two problems with Commonwealth's argument: its premise is wrong and the facts do not support the premise. First, there is no requirement that common law liability predate statutory liability to escape

preemption. Second, even if there were, notaries public had liability at common law that predated the statute.

To advance its legal premise that statutory liability preempts the common law, Commonwealth relies on *Gales v. Weldon*, 282 S.W.2d 522, 529 (Mo. 1955). In *Gales*, the plaintiff sued for compensatory and punitive damages under Chapter 409 of Missouri's Securities Law. On appeal the plaintiff argued that he was entitled to punitive damages. The Court disagreed, finding that no provision in the Missouri Securities Law allowed for punitive damages. The court instructed that "[i]f plaintiff had so desired he could have brought an action for damages for fraud and upon a proper showing could have recovered punitive as well as his actual damages." *Id.* at 528-29. Thus, contrary to Commonwealth's assertion, *Gales* found that the plaintiff *could* have asserted complementary statutory causes of action under Missouri's Securities Laws along with common-law fraud claims. Similarly, in this case, plaintiffs are alleging complementary statutory and common-law claims. Under Commonwealth's own authority, one claim does not preempt the other.

Commonwealth contended, without citation to any authority, that "the Notaries Public Act establishes the 'whole matter of right and remedy' regarding maximum charges for notary services." (L.F. at 66). A notary's

liability, in fact, originated in common law and predated the statute. The Missouri Notary Public Statute governs a notary's qualifications, duties, and liabilities. Although predecessor statutes date back to the 19th Century, the notary public is an ancient position whose qualifications, duties, and liabilities were established by common law. *See, generally, Closen & Dixon, Notaries Public From The Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D.L. Rev. 873 (1992). "The liability of a notary public is founded on the common law and predates any statutory duty." *In Re Thigpeninde v. Matrix Financial Services*, No. 02-14280MAM13, 2004 Bankr. LEXIS 1135 at 5 (Bankr. S.D. Ala. May 25, 2004) (compiling authority from many jurisdictions); *First Bank of Childerburg v. Florey* 676 So.2d 324, 331 (Ala. Civ. App. 1996) (finding common law notary liability even after statutory liability was repealed); *Independence Leasing v. Aquino*, 445 N.Y.S.2d 893, 894 (N.Y. Civ. Ct. 1981) (statutory and common law liability coexist); *Figures v. Fly*, 193 S.W. 117, 120 (Tenn. 1916) (statutory and common law liability coexist); *Clapp v. Miller*, 156 P. 210, 211 (Okla. 1916) (notary has common law liability). Plaintiffs have found no cases and Commonwealth has not cited any case claiming that a notary has no common law liability. Nor is there a case from any jurisdiction holding that a statutory, notary public law preempts common law liability. Commonwealth

is asking this Court to do something that no other court has ever done, *i.e.*, hold that notary statute preempts common law liability.

The only Missouri case addressing the issue of a notary's common law liability held: "Neither this provision, nor the other sections of the statute defining the general powers and duties of notaries public and regulating their fees add anything to their official duty in their protest of negotiable paper as existing at common law. By the law merchant, as well as under our statute, the notary would be liable" *State ex rel. Workingmen's Banking Co. v. Edmunds*, 66 Mo. App. 47, 51 (Mo.App. 1896). Therefore, Missouri recognized common law liability for notary misconduct and the common law unjust enrichment claim is not preempted.

For these reasons, the summary judgment order should be reversed and the case remanded.

III. The trial court erred in granting Commonwealth's motion to dismiss the Missouri Merchandising Practices Act ("MMPA") claim because Commonwealth provided no evidence that it was exempt from the MMPA in that it did not prove that it was under the direction and supervision of the Department of Insurance.

Standard of review: "A motion to dismiss attacks the plaintiff's pleadings. In reviewing a motion to dismiss for failure to state a claim upon

which relief can be granted, the following standard of review applies: A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is viewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause of action that might be adopted in that case." *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-64 (Mo. banc 2001).

In this case, Commonwealth's motion to dismiss the MMPA claim was one sentence in length: In total, it stated:

Count III of Plaintiffs' Petition fails to state a claim against Commonwealth and should be dismissed because there is an express exemption in the MPA for any entity under the direction and supervision of the director of Missouri's Department of Insurance such as Commonwealth.

(L.F. 16). While it is true that an entity under the direction and supervision of the Department of Insurance is, under certain circumstances, exempt from the MMPA, Commonwealth's argument was, at best, premature. It provided no evidence, nor could it have in a motion to dismiss, that it was under the direction and supervision of the Department of Insurance. If Commonwealth had developed evidence to support its position, it should have made the argument as part of its summary judgment motion not as a motion to dismiss. Therefore, the trial court erred in granting Commonwealth's motion to dismiss the MMPA claim because: 1) it was raised in a motion to dismiss and not on summary judgment; and 2) Commonwealth failed to introduce *any* evidence that it was under the direction and supervision of the Missouri Department of Insurance.

CONCLUSION

For all of these reasons, this Court should reverse the trial court's ruling on Commonwealth's motion to dismiss the MMPA claim and should also reverse the trial court granting of Commonwealth's summary judgment motion. It should remand the case to the trial court for prosecution on its merits.

Respectfully submitted,

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